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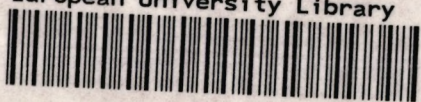
EUI Working Paper LAW No. 90/2

**1992 – What are our Rights?
Agenda for a Human Rights Action Plan**

A. CASSESE/A. CLAPHAM/J. WEILER

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW



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Agenda for a Human Rights Action Plan**

A. CASSESE/A. CLAPHAM/J. WEILER

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Preface

This paper was presented to the Conference 'Human Rights and the European Community: towards 1992 and Beyond' held at the European Parliament in Strasbourg 20–21 November 1989. It represents the final synthesis report of a project directed by Professor A. Cassese. The project drew together a number of experts who wrote reports on various aspects of 'Human Rights and the European Community'. The present paper draws on these reports and all references are to the individual reports, which are listed in the annex to this paper together with details on how to obtain them.

A complete collection of all the reports together with key interventions from the conference will be published by Nomos in 1990.

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I. Why Do we Need an Action Plan?

'Nous ne coalisons pas des Etats – Nous unissons des hommes'

These inspiring words of Jean Monnet assume a new and urgent meaning as the Community takes its greatest step since its establishment to realize the aspirations of European integration, and moves further along the road to an ever closer union among the peoples of Europe. Jean Monnet's words are evoked here as a reminder of the essential position of the individual in the European Community, and of the need, precisely at this stage of exciting and great change, to reassess and reassert the importance of the individual – of the men and women who ultimately make up Europe. These words underline the need in current policy formation for a prudent yet determined Community Human Rights Action Plan.

Such a plan would not only yield concrete and essential protection and individual benefits; it would also give a little soul to the wide range of Community activities in the economic and social spheres. It will be a reminder of the Community's commitment to the ultimate beneficiaries of European integration – Community citizens.

A. Anxiety over the implications of 1992 could be met with effective rights protection

The 1992 programme (laid down in the Single European Act of 1987 which has among other objectives the completion of the Internal Market before 1st January 1993) has received widespread endorsement not only from Governments of Member States but also from the general public. On the whole the programme has been met with real popular enthusiasm. But, at the same time, enthusiasm and expectation have been mingled with anxiety and even fear. In part, this is fear of the unknown, and anxiety over the need to reconstitute oneself as part of a huge new European polity. Inevitably the increased economic freedoms of the large Internal Market lead each individual to feel smaller and fear the impact on his or her daily activities. In addition, the widening European space cannot but

be accompanied by apprehension about one's own individual personal space and autonomy.

The Community cannot and should not shut its eyes to these understandable anxieties. Such a failure could undermine public support and lead to retrograde nationalist reactions long since forgotten. An answer must come from within the Community and its institutions. And part of this answer could take the shape of a concrete and visible Human Rights Action Plan tailored to the specificities of the current stage of European evolution. Although any action plan would have to respect the continuing and essential role played by the Member States on the one hand, and regional and universal organizations on the other, such an action plan could nonetheless reassure the citizens and residents of Europe that along with enhanced economic and geographical freedoms, there will also follow enhanced individual liberty.

B. Human Rights in the EC are a check on Community competence rather than an extension

It is sometimes suggested that for the Community to actively engage in the field of human rights would represent an encroachment on the prerogatives and competences of the Member States. This is a misconception. To be sure, in all its activities the Community must respect the principle of subsidiarity. But the call for a Human Rights Action Plan, limited of course to the field of application of Community law, derives from this principle. By their own actions, the Member States have fully participated over the last two decades in a massive expansion in Community competences – culminating in the issue of the White Paper on the completion of the Internal Market and the adoption of the Single European Act. This new expanded activity takes place in a political context which is still deficient in terms of democratic controls. The Community now extends its reach to a variety of spheres, such as the environment, technological research, telecommunications and the like. Indeed, plans which are right at the heart of the internal market may have an impact on human rights. Thus, for example, the abolition of frontier checks within the Community might lead to stricter internal controls within Member States.

Integration in the field of information technology and the mass media may jeopardize the right to pluralism and the right of groups to safeguard their cultural and linguistic identity. An integrated market may pose greater threats to consumers' rights to safety. By the same token, it can endanger some social rights such as the right to job security. Furthermore, greater freedom to move from one country to another may give rise to social resentment, discrimination, xenophobia and racism.

One of the only appropriate and peaceful weapons against these adverse effects of economic and social integration is human rights protection. The challenge is to render human rights more effective, and consequently less vulnerable to dangerous if gradual erosion, by implementing new remedies and enforcement procedures.

A Human Rights Action Plan limited to the field of application of Community law and directed to the specificities of the new European Single Market, would serve *to put constraints on the Community rather than on Member States*; it would control the exercise of Community competences and provide an additional check on Community activities.

A Human Rights Action Plan is important as it would assure constitutional control in a period of rapid expansion in other fields.

C. A Human Rights Action Plan for an international actor

A Human Rights Action Plan is also important in the international context. One result of the 1992 programme and the Single European Act is the increased importance of the Community as an international actor by virtue of both the Community and European Political Cooperation frameworks. 1992 has brought about an enhanced international visibility. It is no exaggeration to say that the eyes of an ever increasing number of nations are focused on Europe in a manner never before experienced. This coincides with a period in world politics in which sensitivity to human rights is making remarkable inroads well beyond the old liberal democracies. It would be strange, even bizarre, if the Community were not visibly to demonstrate its own commitment to human rights.

D. What is a European identity? Where are our rights?

But above all, a Human Rights Action Plan would contribute to the fashioning of a European identity. What does it actually mean to 'feel European'? Surely the answer is extremely complex and probably not susceptible to exhaustive analysis.

Programmatically, all one can do is to suggest elements which may enhance that feeling. The Internal Market, as such, responds only partly to this exigency. It holds the promise of prosperity, of greater economic vitality, and of course of a breaking down of a variety of national barriers. Greater economic and social interaction will, it is expected, also enhance the sense of actually belonging to a greater polity, of being 'at home' anywhere in the Community. But that in itself is not enough; it is hardly a value with which people can identify or consider as part of their common heritage.

What, indeed, is the common heritage of the Community? The convenience of a Europe without frontiers is not actually a substitute for real positive values. Comparative experience of non-unitary systems on both sides of the Atlantic demonstrates that the notion of individual rights as an expression of shared values becomes one crucial element of identity. Part of feeling German or French, Canadian or American derives from the knowledge and security of belonging to a polity in which one has rights and shared beliefs of tolerance, liberty and freedom. It is not necessarily the vindication of these rights. With the exception of gender discrimination, most people in Western societies will pass their lives without ever personally confronting a violation of their fundamental human rights and hence the need to have recourse to protection. But the knowledge that these rights are respected, will be protected, and that one lives in a political society which takes them seriously becomes part of one's group identity.

A Community Human Rights Action Plan will try to impart the same feelings in the Community context.

II. What Kind of Action Plan Do we Need?

At first blush, the preoccupation with fundamental human rights in the European Community might seem as an indulgence of the affluent. By any comparative and relativist account, both the extent of Community violations of human rights and the level of protection afforded in such cases are not unsatisfactory. There are certainly no systematic, persistent and gross violations of human rights, and the mechanisms for redressing those violations which do occur tend to be adequate.

So what content, other than slogans for media consumption, may an Action Plan actually have? Even if, as argued above, there is a need for a reassertion of the Community's commitment to human rights, would it not be enough simply to publicize the existing system?

We think not.

In the remainder of this Synthesis Report we set out in some detail the conclusions culled from the various specific reports of the Group of Experts. We first analyze the 'acquis communautaire', highlighting the achievements and lacunae in the present situation. Then we set out the major proposals raised by the Group of Experts. We have divided these into two sections: Normative Proposals dealing with the substantive content of human rights; and Methods of Protection dealing with mechanisms, devices and institutions to enhance the actual vindication of human rights.

In these introductory remarks we do not wish to anticipate the actual proposals but to explain the premises and philosophy that guided our thinking and choices.

A. An agenda not a blueprint

The title of our Report – Agenda for a Human Rights Action Plan – means exactly that: the issues and the options which we think

should be considered by Community policy makers in elaborating an Action Plan. The Reports of the Group of Experts run to well over one thousand pages. We have cast our net wide and the catch has been correspondingly large. We do not believe that even the most ambitious plan could, or should, take on board all the proposals outlined. We do think that they should all be considered as part of an informed policy making process. Some proposals are contradictory; it will be a matter of policy which to prefer. Many of the proposals have advantages and disadvantages; thus frequently we have limited ourselves to point these out and leave it for others to weigh them in the balance. On occasion we have expressed our preference. Finally, in this synthesis we could not do justice to the richness of the full reports. In many ways we can only give pointers to the real discussion which is to be found in the actual reports.

B. Subsidiarity and synergy

The Community can not offer a panacea for all the social and economic problems of Europe; this is equally true in the field of human rights. Consequently, respectful of the principle of subsidiarity, we have tried to put emphasis only on those rights which derive from the specificity of the Community, and concentrate on action where the Community is clearly better placed than the Member States, or regional and universal organizations, to offer protection.

Similarly, we have not considered the Community in isolation. Effective protection will only result from an interaction between the different levels and systems of protection which already exist. Like it or not, individuals in Europe find themselves part of a State, of the Community, of the Council of Europe, and of the United Nations. Each of these must play their part. And just as the existence of, say, a list of fundamental rights and a constitutional court in Germany or Italy has not precluded German and Italian adhesion to, and participation in, the machinery of the Council of Europe, so it would seem unconvincing to suggest that the existence of these State and Regional systems absolves the Community from evolving its own specific approach to human rights.

C. Lex Lata – A critical approach

We do not wish to denigrate the achievements to date. However, in analyzing the existing norms a critical approach is adopted, focussing not on that which works well, but on that which works less well, on the lacunae and shortcomings.

D. De Lege Ferenda

'New' rights and effective access to justice

In looking to the future, we have tried to suggest ways in which the Community can instigate normative and procedural improvements so as to ensure that the protection of human rights operates in a more effective way.

In normative terms, we have laid an overwhelming emphasis on what may be called 'new' human rights which, by their nature, pose the greatest challenge to a Community moving towards the year 2000. In particular, we have dealt with areas which correspond on the one hand, to new facets of our industrial society – informatics, biotechnology, the environment and the like – and, on the other hand, we have examined topics relating to the creation of the new European space. In some cases, like gender discrimination, we have revisited classical rights in the light of new sensitivities and conceptions.

As regards methods of protection, our approach can be easily summarized: we have identified as the main concern the need to make rights effective. Thus, while acknowledging the centrality of judicial review in the architecture of human rights, we have sought to show that the existence of a formal legal remedy is often not enough. Individuals may not be aware of the remedy, indeed of the violation; they may not have the money or the knowledge to invoke the remedy, and in many cases, such as the violation of diffuse and fragmented rights, an individual remedy is simply not ideal. We have thus searched and made proposals for procedural and institutional innovations that can render rights real, rather than rhetorical.

E. New problems and perspectives

(1) The abolition of frontiers

The removal of frontiers in Europe poses a number of human rights questions. As mentioned above, the abolition of frontier checks within the Community could lead to greater internal controls within Member States as well as at external Community frontiers. Already the Netherlands is considering the introduction (together with other measures) of identity cards (presumably in anticipation of 1993, or the completion of the objectives of the Schengen Treaty). These measures were, or will be, implemented *independently* of Community provisions and the mechanisms for their monitoring and control for conformity with human rights. If we place the abolition of frontiers in the context of racism, xenophobia, terrorism, drug trafficking and international crime, AIDS testing, refugee policy and the granting of asylum, it is clear that the human rights implications loom large.

Bearing in mind the General Declaration on Articles 13 to 19 of the Single European Act, we can look forward to new crime fighting techniques, and increased vigilance as regards the legality of the presence of non-EC nationals in the Community. What has to be borne in mind is that in this case the threat to human rights does not come from the Community organs or agents, but from the dynamics of the drive towards the abolition of frontiers. Therefore, even if the Community were more accountable in law for human rights violations, Member States' policy on refugees, combating crime, and surveillance of people's movements in the Community, would fall outside Community accountability. Paradoxically, the Community has rights without responsibilities: rights to demand that Member States create a frontier-free Europe, but no responsibility to ensure that this is done in accordance with protection of human rights, this is left to national and international protection machinery.

(2) Technological and other phenomena in the context of 1992

The political moves towards the implementation of the internal market is accompanied by, and dependent on, the formation of pan-European industries with enormous economic and social power; coupled with this are certain technical innovations which similarly deny the relevance of national frontiers within Europe. The creation of a single market will undoubtedly lead to a good deal of restructuring of the Community *labour market*. In other words those workers or enterprises which are not equipped to compete in a pan-European market will be made redundant. Unless Community citizens are really free to move throughout the Community as they search for work and retrain, there will be a frontier-free Community for producers and consumers but a barrier-ridden Europe for those looking for work. As long as, and to the extent that, unemployment benefits, housing allowances, family income supplements, etc., are not transferable, workers will be unable to retrain as demanded by the exigencies of the new single market. Not only would this hinder the efficiency and prosperity of the Common Market, but it would also lead to considerable human suffering.

Again, it is not the action of any one Community institution which can be pin-pointed but the reaction of market forces to the building of the internal market which is to blame. Clearly there could well be enormous benefits for all in the long term, however most of the studies carried out for the Community show that 'far from negligible social effects will be caused in certain specific areas by the completion of the internal market. It is therefore necessary to take them into account and decide what specific Community action should be taken' (*Social Europe*, special edition, 1988). Such action will obviously include encouraging the 'social dialogue' (Art. 118B), and constructive use of the Social, Regional and Guidance Structural Funds. However a legally enforceable 'floor of workers rights' along the lines of that contained in the Social Charter may be crucial in this context. Such a move has the advantage that it would protect the human rights of marginalized and atypical workers. The alternatives: harmonization of minimum standards, decentralization, or deregulation offer no such protection, indeed the first approach – harmonization – runs the risk of entrenching national practices which systematically discriminate

against atypical workers (part-timers, homeworkers, married women, mothers, and mobile workers) by demanding dispositive conditions of eligibility for benefits such as: a certain number of hours per week and a particular length of service with the same employer. In the words of the Venturini report '1992: The European Social Dimension': 'With regard to these questions, it should not be a matter of looking for deregulation, but rather of reregulating in more appropriate ways.'

New technology coupled with Europe-wide reorganization of business will have an immediate impact on the workforce. The Community has already moved in order to insure some forms of protection in areas such as: collective redundancies, the protection of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, and the protection of employees in the event of the insolvency of their employer. Although such regulation is hardly ever described as human rights legislation, it is the restructuring of industry in the context of the internal market which could lead to the greatest suffering for Community citizens. The need to protect the 'social dimension' in the process of market integration has been constantly reaffirmed by all the Community institutions. It is suggested that it is in this sphere that the Community not only poses the greatest threat to human dignity, but also potentially offers some of the greatest possibilities for protection. Just as the Community primarily grants *economic* rights to economic actors, it must primarily be concerned with protecting the *social* rights of its citizens faced with the dynamics of a single European Economic Community.

Technological change not only has consequences for Community workers but also for *Community citizens generally*. The advent of satellite television not only offers opportunities for a greater understanding and identity in Europe but also poses new human rights questions (concerning freedom of information and expression) which inevitably have to be answered at the supranational level. Similarly, the transborder flow of information through electronic mailing systems together with the arrival of multinational data banks means that often national legislators are ill-equipped to really ensure the protection of human rights. This data might contain not only

confidential, personal or private information, but nowadays can include details of one's genetic make-up, sero-positivity etc. In such areas *Community law* would often have supremacy so that priority would have to be given to the four freedoms (free movement of persons, freedom to provide services, free movement of goods and free movement of capital). As long as there is no real guidance as to how these freedoms may be limited in order to protect human rights, there is a danger that fundamental human rights can be easily violated with no recourse to legal protection. In a Europe where huge corporations with enormous technological capacities operate on a transnational basis these questions are of crucial importance.

(3) The gender perspective

European Community law gives a central place to non-discrimination and sex equality as general principles of law. For this reason, new gender perspectives can not be ignored. Obviously questions concerning pornography, abortion, contraception, surrogacy, medical experimentation, etc., will be particularly controversial. However these matters are more and more likely to fall within the field of Community law. Human rights law offers no easy answers to these questions; however, inclusion of such a gender perspective may ensure that a wider range of points of view are considered in the decision-making process. Such a perspective seeks to resituate the debate. For example, instead of judging pornography for the corrupting effect it has on the *male* consumer, one looks at the harm it has for potential *victims* – *women* who may be the victims of exploitation within the industry, *women* who may be subjected to sexual attacks, and *women* who may suffer the effects of general sexual discrimination and prejudice.

In the end, it may be that *non-discrimination provisions alone* are ineffective when it comes to tackling discrimination against women. It may be that positive action programmes will play the most important role in the future. The Council Recommendation of 13th December 1984 on the promotion of positive action for women has no legally binding force and as yet there are few national or Community provisions which

promote equality through positive action. If women in the Community are to achieve more than 'formal equality before the law', there will have to be action in areas which go beyond pay, pensions, and social security. There is no reason why, if the Community is to take women seriously, it should not investigate initiatives relating to sexual harassment at work, domestic violence, rape crisis centres, child care facilities, contraception, and medical experimentation on women. The construction of a Community (or internal market) where men and women enjoy real equality of opportunity will depend on whether the Community takes into account the full implications of the gender perspective.

Another question which arises in this context is discrimination against homosexuals. Such discrimination has been the subject of a Resolution of the European Parliament in 1984, a Recommendation of the Parliamentary Assembly of the Council of Europe in 1981, and is specifically outlawed in more recent Human Rights Charters (such as the Quebec Charter of Human Rights and Freedoms). Furthermore, the arrival of the AIDS virus has led to violent prejudice and discrimination against gays. This has particularly far-reaching consequences in the employment, housing and insurance spheres. At the moment, questions concerning insurance are often regulated through national self-imposed codes of practice. In the event of a single European market for insurance, such codes could become uncompetitive, with the result that perceived high risk candidates would be simply excluded from these areas of economic life. Again a Community human rights perspective demands more than harmonization or decentralization.

III. The Story so far – the European Court's 'acquis' and Community Action Concerning Human Rights

The Community response to these problems and developments could be to offer its citizens legally enforceable rights with specially adopted methods of protection and enforcement.

Rights are an especially useful instrument within the legal order of the European Community, due to the particular nature of Community law. In a crucial early case the European Court of Justice expressed the nature of Community law as follows: 'Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.' (*Van Gend en Loos* Case 26/62 [1963] ECR 1, 12) The Court was here referring to rights in the Treaty of Rome in the context of the elimination of customs duties; however, all sorts of rights for individuals now arise under Community law: rights under regulations and directives, rights to legal certainty, the principle of proportionality, the right of confidentiality in lawyer-client correspondence, and lastly human or fundamental rights. This last category is special because these are the rights which historically have been considered 'inviolable', 'inalienable', 'natural', 'basic' and endowed with a special moral force.

However, it is exactly these rights which have a confused and ambiguous status within the Community legal order, and which have a vital role in the future of the Community as it moves towards an internal market.

It would seem that there is some convergence concerning some rights known as 'fundamental rights'. Most importantly *all* the Community Member States have ratified the Council of Europe's European Convention on Human Rights (ECHR), and *all* have made the appropriate declarations allowing for individual petition to the European Commission of Human Rights (Art.25) and accepting the jurisdiction of the Court

(Art.46). Although this Convention is not incorporated into the Community legal system we should mention the Joint Declaration by the three Community institutions on Fundamental Rights of 5th April 1977 which stresses the importance that these institutions attach to fundamental rights as derived in particular from the Constitutions of the Member States and the European Convention on Human Rights. Such a Declaration adds a certain moral and political force to the protection of human rights in the Community legal order, but one can not pretend that it creates any additional remedies or procedures. It may be that the insertion in the Single European Act of two preambular paragraphs expressing the Member States' determination to work together to promote and display democracy on the basis of fundamental rights will have knock-on legal effects, but for the moment this declaration of intent has had little impact on the lives of Community Citizens.

Many have hailed the courageous steps taken by the Court of Justice in this field. Not only has the Court been prepared to go beyond a strict minimum of protection, a lowest common denominator to the constitutional order of the Member States, but it has asserted Community rights such as 'the principle of proportionality' which are already filtering back into the legal orders of those Member States where no such rights existed. However the Court has no written catalogue of human rights to work from. Its method and pronouncements are therefore rather vague and one is always aware that a fundamental priority for the Court is to achieve economic integration in accordance with the objectives of the Community. When these objectives, or the methods used to achieve them, conflict with human rights principles, there is little evidence that the Court has the power or the inclination to prefer human rights values over Community objectives.

In order to understand in greater detail the role of human rights in the Community system, it may be helpful to make the following distinctions:

- A. rights operating in relation to national authorities and private bodies outside the scope of Community law;
- B. rights in the field of Community law;
- C. rights protected against action by Community institutions or agents;
- D. rights which might be granted or created by the Community; mostly this concerns what could be called social rights (such as those found in the European Social Charter [1961]) and citizens' rights (such as voting, residence, and participatory rights);
- E. rights of people in third countries;.

A. Rights outside the scope of Community law

The first category covers questions which arise outside the scope of Community law. These might be measures taken by a national authority, say concerning: the death penalty, military service, the control of public assemblies, or the detention of terrorists without trial. In such cases, the victims of human rights abuses will have recourse to domestic courts under national legislation, and eventually to the Strasbourg Commission and Court of Human Rights. The European Court of Justice at Luxembourg has no competence to decide such matters. Few people would suggest that the Community should move into this sphere and provide another layer of judicial protection.

B. Rights arising in the field of Community law

This category includes rights in the field of Community law which arise at the national level within the framework of Community law. These rights are found in hundreds of Community provisions. Provisions in the EEC Treaty alone

cover areas such as the free movement of workers, rights of establishment, freedom to provide services, non-discrimination on grounds of nationality, and the principle that men and women should receive equal pay for equal work. If we add to this, secondary Community legislation such as directives (for example on sex discrimination) together with regulations and decisions, we have a vast honeycomb of Community provisions covering nearly every area of economic life. However, it is worth pointing out that these rights should be considered '*fundamental Community rights*' rather than '*universal human rights*'. This is because their enforcement may depend on being a Community national or the Community transnational context in which they operate. Human rights such as those found in the European Convention on Human Rights are universal and granted to anyone within the jurisdiction of the Contracting Parties *regardless of nationality*.

Treaty provisions, regulations, directives, and decisions are all capable of granting individual enforceable rights and duties at the national level. But what happens when *Community provisions* such as these conflict with *human rights* contained in international treaties and enshrined in the Constitutions of some of the Member States?

It is suggested that according to the European Court of Justice a distinction has to be drawn between national legislation operating in the field of Community law and national authorities implementing provisions of Community law.

(1) National Legislation operating in the field of Community law

These legislative provisions can not at present be reviewed by the European Court of Justice in Luxembourg for compliance with the European Convention on Human Rights (and presumably other non-EC human rights). This is implied by the *Cinéthèque* case where the Court stated that: 'Although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this

case, an area which falls within the jurisdiction of the national legislator.' This case involved French restrictions on the sale of videocassettes of cinematographic works which were about to be shown or had recently been shown at the cinema. The legislation imposed a ban on the sale of the videocassette for a certain period following the release of the film in cinemas. The aim of the legislation was to preserve and protect the French cinema industry. Although the importation of videocassettes clearly falls within Community law, the Court declined to deal with the compatibility of the legislation with human rights law as found in the ECHR. Incidentally, both the Advocate General and the Commission felt the legislation was compatible with Art.10 ECHR (Freedom of expression and freedom to receive and impart information).

(2) National authorities implementing Community provisions

The history of the Court's jurisprudence on this question has been analyzed in great detail, and the background is well known. Even though proposals for insertion of a provision guaranteeing political and fundamental rights were rejected when the Community Treaties were drafted, the Court has gradually incorporated the protection of fundamental rights as a general principle of Community law. This came about against a background of discontent in the Constitutional Courts of Italy and Germany, which had suggested that they may one day have to review Community provisions for compatibility with basic human rights. The European Court of Justice having rejected arguments based on human rights principles found in national law in an early case in 1959, later stated in the *Stauder Case* (1969) that 'the fundamental human rights are enshrined in the general principles of Community law and protected by the Court'. However this was merely *obiter* and hardly a very concrete assertion of the rights which merit protection. In the *Second Nold Case* (1974) the Court went further and explained that:

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures

which are incompatible with fundamental rights recognized and protected by the constitutions of those states. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.(Case 4/73 [1974] ECR 491, 507)

However we can not forget that the European Court of Justice is the guardian of the EC Treaties and that it has stated categorically that 'The protection of such rights, whilst inspired by the constitutional traditions common to the Member States must be ensured *within the framework of the structure and objectives of the Community*' (Case 11/70 [1970] ECR 1125, 1134). This means that human rights values will have to be interpreted and weighted in the light of the exigencies demanded by European integration. It has to be admitted that although the Court has increasingly referred to the Convention, the European Social Charter, international treaties, and constitutional principles and traditions, the rights contained therein have not really been developed or used to strike down Community provisions.

In only one case has an individual really benefited from the European Convention on Human Rights in this context. In the *Kent Kirk case* (63/83 [1984] ECR 2689, 2718) the Court stated that:

The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice.

This is the clearest statement in the field. It may be that it is only a question of time before a suitable case comes before the Court and some real case law is developed. For the moment we have to conclude that the Court's case law leaves no clues as to which rights would be protected. References to common

Constitutional principles, traditions, practices, precepts or ideas are unhelpful. Even if such things existed the Court's method so far has been to selectively distill common practices from *some* Member States (in the *Hauer* case the Court examined Germany, Italy and Ireland) and even then these only offer 'inspiration' or 'guidelines'. It is possible that in searching for a common standard the Court may be reduced to finding a bare minimum of protection which falls below what would be accepted in most of the Member States. Furthermore, even if it seeks a maximum standard, Constitutions will reflect different political cultures in very different countries, so rights can not be simply selected, extracted and accumulated. For instance, there may be a careful constitutional balance between the right to strike and the right to work, or the right to compensation in cases of nationalization may be counterbalanced with a severely progressive taxation system.

Clearly the Court had to assert its jurisdiction over the compatibility of Community provisions with human rights. This it has done. However, apart from the ban on retroactive penal measures, we are still in the dark as to exactly which human rights operate in this sphere. The present methodology of the Court is unlikely to yield simple results.

C. Rights against Community institutions or agents

This section raises a different problem. Whereas the measures discussed above can be scrutinized for human rights compliance either at the national level or at Strasbourg under the Convention machinery, action taken by Community organs can *only* be reviewed by the European Court of Justice. The European Commission of Human Rights has rejected applications against Community bodies simply stating that the Community is not a party to the Convention. (One could attempt to distinguish these cases as involving acts which take effect within the framework of the European Communities. Should a Community act have effects reaching beyond a strict Community context it may one day be held to invoke the responsibility of all the Member States under Article 1 ECHR.)

This means that the only protection available to victims is to be found at the European Court of Justice. This Court has examined the action of Community organs for compliance with the rights contained in the European Convention. Questions of religious discrimination, invasion of privacy, and due process under Article 6 ECHR have all been considered. The Community was found to be justified in all these cases.

In most states, legislative and administrative measures can be challenged before an independent authority. Often there may be a filter procedure so that prospective legislation can be amended so that it conforms with constitutional rights. Although the European Court of Justice has declared that it will ensure that Community action conforms with fundamental rights, it may be that judicial protection after the event is not the best form of protection.

If citizens do not know about the effect of Community provisions they can not challenge them; if citizens have no resources they can not mount a successful challenge; if citizens do not have a direct and individual concern they do not have the right to go to the Court; by the time the Court hears the case there may already be hundreds of victims all over the Community. For these reasons it is not particularly apposite that protection be left in the hands of the Court alone. Furthermore, human rights' violations by the Community are not particularly visible. The Community does not hang, torture or imprison people, nor does it have a record of genocide, slavery or systematic racial discrimination. However, its action may still have far-reaching effects on the social and economic lives of its citizens, and due to the very nature of its procedures provisions and decisions are not made in the glare of public attention. There is a certain secrecy and obscurity about the decision-making process. Just as other bureaucracies and legislative bodies are subjected to checks and balances, the Community organs too could create their own watch-dog. This is dealt with in more detail below.

D. Rights which might be granted or created by the Community

(1) Social rights

The legal questions which arose in parts A, B, and C are really rather far removed from the lives of most Community citizens. As soon as we move from the rights guaranteed in the European Convention towards a wider definition of human rights, we find rights which touch everyday life: rights to social security and education, rights of workers, rights to the environment, etc. However, we are now no longer talking exclusively about legally enforceable rights, but about rights which the Parliament, the Commission, the Economic and Social Committee, and Community citizens would *like* to see proclaimed by the Community and, where possible, enforced.

Most recently a great deal of attention has been given to the compilation of a Community Charter of Fundamental Social Rights. This type of social legislation is not universally popular with all the Member State governments. However, the Charter is not supposed to be legally enforceable but it would be a Declaration by the Heads of State or Government that 'Member States commit themselves to take such steps as are appropriate and to mobilize all the resources that may be necessary in order to guarantee the fundamental social rights contained in this Charter...'

It is not easy to see exactly how such a Charter would eventually operate to bolster the protection of fundamental rights. It is enough to state that just as judicial protection is insufficient to protect civil and political rights, so Charters, Declarations, and Resolutions are not effective instruments for social protection. Not only does social protection need a firm legal basis on a par with the protection of economic freedom, but it also needs to be enforced through national actors at several levels, most importantly at the level of the 'social dialogue' between the two sides of industry. The issue of social rights is dealt with in more detail below.

(2) Citizens' rights in a People's Europe

The 1973 Copenhagen Declaration on European identity led to a decision at the Paris summit (1974) to set up a working party with instructions to 'study the condition and timing under which the citizens of the nine Member States could be given special rights as members of the Community'.

The Tindemans Report on European Union proposed among other things: the *protection of the rights of Europeans* where this can no longer be guaranteed solely by individual States.

The report then identified three areas. The first area was fundamental rights in the face of the gradual increase of the powers of the European institutions. The second area was consumer rights and the third, protection of the environment.

Following the Fontainebleau European Council meeting in 1974, an *ad hoc* Committee on a People's Europe was set up. Two reports were then presented to the European Council. The first concentrates on 'easing of rules and practices which cause irritation to Community citizens and undermine the credibility of the Community' and also on 'wider opportunities for employment and residence.' The second report concentrates on citizens' rights such as voting rights in European and local elections, consultation on transfrontier issues, as well as covering areas such as the promotion of culture, education and sport, volunteer work in Third World development, health, social security and drugs.

We have come a long way from the early questions concerning the exact status of the European Convention on Human Rights in the Community legal order. However, it is in this area of a *People's Europe* that the Community stands to achieve most success, with immediate results for Community citizens.

Mention might be made of some of the programmes which have been put into operation as a result of the *People's Europe* reports. In 1986, the Commission adopted the *Comett*

programme for coöperation between universities and industry in the field of advanced technological training; in 1987, the *Erasmus* programme was implemented; in 1988, the *YES for Europe* youth exchange programme was adopted by the Council, and in 1989, the *Lingua* programme which encourages foreign language teaching was adopted. In more general terms, the Community is moving to tackle questions of pollution, the protection of the ozone layer, and radioactive contamination of foodstuffs.

As far as a frontier-free Europe is concerned, hundreds of measures are continually being elaborated and implemented. It would not be appropriate to go into the details here, and many of these measures arise in the context of the different reports. Some of the rights offered by the Community in the context of the internal market could be seen as human rights: the right to leave one's country and return, non discrimination on grounds of nationality (between Community nationals), the right to broadcast information across frontiers and so on. But we still have to ask whether the main aim of these rights is merely to facilitate the better operation of an unregulated single market, or whether they will be adopted taking full cognizance of the need to protect the dignity of Community citizens. The arrival of these new rights could mean we lose the old ones: if speeding up frontier formalities means reading a bar code from a European passport and the information contained in the data bank is not controlled in accordance with respect for private life (Article 8 ECHR), human rights in the Community will have taken one step forwards and two steps back. The challenge for the Community would now seem to be twofold: firstly to ensure that new provisions operate so as to respect the human rights of its citizens, and secondly to implement some system so that these provisions can be judged for their compatibility with established human rights norms. As was seen above, the legal landscape is presently littered with craters so that citizens wishing to challenge action for compliance with fundamental human rights may often find themselves trapped without adequate legal protection at the national, Strasbourg, or Luxembourg level.

(3) The European Parliament's April 1989 Declaration of Fundamental Rights

The pressure for a written Community catalogue of fundamental rights has been constant ever since the 60s when the Court asserted that violations of human rights in the Community sphere are inconsistent with Community law. The Declaration of the European Parliament is the first measure which responds in a concrete way to the call for a written catalogue.

The immediate political genesis of the Declaration may be traced to Article 4 of the Draft Treaty Establishing the European Union which foresaw the adoption by the Union of its own declaration on fundamental rights '...in accordance with the procedure for revision laid down in Article 84 of [the] Treaty.' It was thus that the Institutional Committee of the Parliament (as the Committee responsible in the area of Treaty reform) seized the initiative in promoting the Declaration.

No single reason can explain the motivation for the adoption of the Declaration or its rationale.

From a strictly legal point of view, the Declaration was perceived as a response to the widely perceived weakness in the current system of protection: the absence of a written catalogue encapsulating the rights to which the Court would give protection. It should however be pointed out that not all commentators share the view that the absence of such a written catalogue was indeed a serious lacuna nor that a declaration of the European Parliament could, strictly speaking, fill that gap.

It is, however, submitted that this strictly legal argument was not the principal *raison d'être* for the adoption of the Declaration. Far more important in the minds of the Parliamentary promoters of the Declaration was the hope that its adoption would achieve a double symbolism. On the one hand, it was forcefully argued that the Declaration could become one element in the building of a European identity for Community citizens and residents: an important statement about what it means to belong to the Community. Views differ as to the potential effectiveness of such an act, and in any event

it would depend on the level of public awareness of the existence and usefulness of the Declaration. To date, such awareness has been negligible. On the other hand, adoption of the Declaration was meant to be a symbolic act demonstrating the preoccupation of Parliament and its concern for the welfare of Community citizens. This explains, perhaps, the urgency in trying to steer the Declaration through the Parliamentary process before the 1989 elections.

The ultimate importance and impact of the Declaration will depend on the reaction it receives from the other organs of the Community, and in particular from the European Court of Justice. Ideally, from the perspective of the promoters of the Declaration, a common institutional statement endorsing the Declaration coupled with recourse to it in the jurisprudence of the Court will generate incrementally a greater awareness amongst lawyers and ultimately among the general public

Details of the legal philosophy and juridical value of the Declaration can be found in the report 'Methods of Protection'. We shall deal with the future prospects of the Declaration in section V: 'Methods of Protection'.

E. Rights of people in third Countries

The Commission has so far refused to develop a legal basis for a Community human rights policy, stating that such a move would take them outside the objectives of the Community.

However the European Parliament is active in this area and since 1983 has been adopting reports on 'human rights in the world and Community policy on human rights'. This work is carried out by the Political Affairs Committee and the Subcommittee on Human Rights. These bodies have competence *only* over human rights in non-Community countries. These reports limit themselves to three rights: the right to life, the right to respect for the physical and moral integrity of the person, and the right to a fair trial by an independent court.

Since the beginning of the 1970's Parliament has been active in a number of areas including joint meetings with the Latin American Parliament, ASEAN (the interparliamentary organization), in CSCE, and in the ACP/CEE Joint Assembly. Apart from numerous resolutions on human rights all over the world the Parliament is also involved in a certain amount of 'case work', and may lend its platform to victims of human rights abuses. Most recently Parliament has used its new powers under Article 238 EEC Treaty as amended by the Single European Act. This Article requires that agreements concluded between the Community and third States need the assent of Parliament acting by an absolute majority of its component members. Relying on this Article, Parliament has refused to give its assent to Protocols concerning Israel and Turkey on grounds of human rights violations. As the Community enters into more and more external agreements this control by the Parliament may be of increasing importance. It has been suggested that this new power may enable Parliament to achieve its desire that human rights provisions be inserted into external agreements and development programmes.

One might briefly mention that the Commission also plays an important role in this area. Not only is it formally linked to European Political Cooperation and charged with ensuring appropriate relations with the organs of the United Nations (Article 229 EEC), but it also takes its own initiatives. Examples include its appeal to the South African authorities concerning the imposition of the death penalty for the Sharpeville Six, and the condemnation of the South African intervention in Botswana in 1988. Initiatives on human rights matters are usually the responsibility of the Commissioner whose portfolio covers the country concerned. So far the Commission has rejected Parliament's proposals that aid and development agreements should be drafted so that human rights violations might permit sanctions to be implemented.

In the end it could be said that the biggest threat to human rights in third countries may be the Community itself. Should the Community become protectionist *vis-à-vis* Third World countries, or fail to ensure that trade and development policy with the ACP and other countries is really leading to

improvements there, rather than useful raw materials here, then it will be the *economics* of the European Economic Community which will be the cause of the denial of basic rights in the Third World. Moreover, it remains to be seen to what extent any Community common immigration, refugee or asylum policies will respect the human rights of people from non-Community countries.

IV. Areas where Normative Action Might be Taken

As was stated above this project only touches tangentially on questions of classic rights (right to life, right not to be tortured, to public assembly, to fair trial, to freedom of religion, etc.). The main emphasis has been placed on rights which are particularly relevant either in view of new challenges posed by increasing economic and social integration and the run up to 1993, or on account of new challenges posed by the latest technological developments.

A. The strains on human rights posed by the integration process

(1) Social and economic rights

This is an area where the Community institutions have produced an impressive body of legislation, for example, in the area of equal pay for men and women, collective redundancies, hours of work and holidays, training and new information technology, poverty, unemployment among women, migrant workers, employment of disabled people, etc. In addition to a host of specific Community acts, some general documents or instruments have also been adopted. Suffice it to mention the 1988 Interim Report of the Interdepartmental Working Party of the EC Commission, the Opinion adopted on 22 February 1989 by the Economic and Social Committee, the Declaration of Fundamental Rights adopted on 12 April 1989 by the Parliament (it includes a number of economic and social rights), as well as the Commission's Draft Charter of Fundamental Social Rights of 30 May 1989.

In spite of a conspicuous body of general as well as specific standards, a number of problems remain that require some action by the EC. We shall emphasize only three of them.

First, there are considerable differences in the systems of economic and industrial relations of the Twelve Member States. In this sphere, national legislation, case-law, custom and practice all vary enormously from country to country. It follows that when workers start benefiting from full freedom of movement in 1993, they will of necessity have to face a remarkably different treatment in the host country from that which they were accustomed to in their country of origin. This, for instance, applies to social security, collective bargaining, the right to a basic minimum wage, the right to rest and leisure, etc. In these and related areas, one can discern varying degrees of recognition in the various Member States, with some of them reaching high levels of refinement and others granting less extensive rights.

Second, a unified market will of necessity result in making some classes of workers more vulnerable to economic processes, due to lack of adequate training, skills or qualifications. Collective redundancies, transfers of undertakings, insolvency, dismissals, reduction of working hours, etc. will affect a great number of workers. All this will also follow from the two phenomena outlined in Part II above: transformation or merger of enterprises as a result of major technological innovations; changes or restructuring of firms due to the need to face an increase in competition in a unified common market.

Third, new classes of workers are increasingly evident. The so-called atypical workers (home workers, workers on job-sharing schemes, part-timers, temporaries, people combining housework or childcare and employment, or employment and training, fake self-employed, teleworkers, subcontractors, persons engaged in clandestine work in the grey or black economy, etc.). These new forms of work are not transitory but structural phenomena pre-figuring the forms that work organization may take in the 1990s and beyond.

Plainly, it is imperative for the Community to give a response to these problems. Three questions arise in this context. First, in what areas should the Community take action to contribute to the solution of those problems? Second, by what methods? Third, what procedural and institutional changes are needed?

As regards the first idea, one may indicate six basic social rights, where some form of uniform regulation should be reached at Community level, and in addition four areas where the Community should strive to establish at least general guidelines. The six fundamental rights are: 1) the right to a general wage standard or a basic minimum wage to combat low pay (which is caused primarily by segmentation of the labour market); 2) the right to a certain length of working day as well as to rest and leisure; in this area general standards should determine normal weekly working times, regulate night work, fix ceilings on overtime working, provide for periods of weekly rest, public holidays and paid annual leave; 3) the right to job security, in particular a right against discrimination in recruitment or preferences for certain groups, a right to employment continuity (through temporary suspension on various conditions), in case of maternity, parental obligations, public activities, military service, illness, and so on, as well as a right to protection in the advent of termination of the contract of employment; 4) a right against discrimination on grounds of sex, race, religion, language, birth, economic position, education, etc.; 5) a right to social welfare benefits; 6) freedom of association, the right of collective bargaining as well as the right to strike.

While in the six aforementioned items the principal aim should be to achieve some harmonization of the legal regulation of the Twelve, there are four other areas which stand out both because they are related to new social and industrial phenomena typical of the 1990s, and because they constitute areas where it would be much more difficult to achieve harmonization; consequently, the goal should be to attain flexible and general standards which can be adjusted to the varying conditions of each State. The first area is that of restructuring labour in the enterprises as a result of the restructuring of enterprises

prompted by plant modernisation or mergers or changes due to greater competition. Here it would be important to strive for a mixture of collective and individual entitlements concerning: health and safety risks arising from changes introduced during the restructuring process; redundancy and economic dismissal; changes in working time and their implications for the employee affected; consequences of new technology on the skills and working conditions of the employees; participation of representatives of the workforce in the process of restructuring.

The second area concerns the atypical workers referred to above. They should be fully integrated and assimilated within labour law and social security law. It may be important to ensure that any minimum rights granted to this group of workers should be enforceable *horizontally*, that is to say directly against the employer. Horizontal enforcement is important in such cases as atypical workers are often excluded from the social dialogue and therefore denied the rights protection which accrues from collective bargaining.

The third area relates to health and safety of workers at work. Here one might suggest that action be taken to provide: a legal basis for the rights of workers' representatives in health and safety; representatives' rights to information and consultation, or to carry out inspection; their right to halt the work of an enterprise; their right to time off to carry out their duties; the facilities to which they are entitled and special protection against dismissal or discrimination.

The fourth area concerns the promotion of positive action for women. As the constitutional and legal structures of Member States are not always clear as to the legal status of various forms of positive action against sex discrimination, and in some cases the status quo is actually hostile, one of the goals should be to lay down a general principle of interpretation which among other things would legitimize positive action so as not to characterize such actions as unlawful discrimination or violations of the principle of equality.

Let us now turn to the method for putting all these objectives into practice. It is suggested that while the Community institutions should formulate broad standards in the aforementioned fields (possibly in a *Directive*), the best way of fleshing out and elaborating them should be by means of the social dialogue envisaged in Art. 118B of EEC Treaty as amended by the Single European Act. The social dialogue, that is, collective bargaining between the social partners within Member States as well as at the European level, should be used for developing and specifying the actual contents and means of implementation of the various fundamental rights listed above. However, there are a number of ambiguities surrounding Articles 100A(2) and 118, a Treaty amendment should put the social dimension of the Community on a firmer basis.

More specifically one way forward might be an instrument for social and economic rights which avoids the political obstacles inherent in entrenching substantive rights at the Community level. This instrument could primarily promote the social dialogue, and only secondarily specify the contents of the rights to be included. The framework would be based on firstly, a series of Community incentives and resources which would encourage the inculcation of the values enshrined in the Community instrument. Secondly, new machinery would be established which would operate at the national and/or Community level to resolve deadlocks over collective agreements concerned with fundamental rights. Thirdly, there would be entrenched a 'right to strike over violations of fundamental rights, or in the event of impasse in negotiating agreements on such rights'. The protection offered by this right would be equivalent to the maximum protection accorded to strike action by that State. In this way the most appropriate protection would be evolved at the national level, but where the social dialogue fails concerning Community fundamental social and economic rights, the Community legal order would offer a new form of protection. (This option is outlined in much more detail in the report on 'Social and Economic Rights').

(2) Environmental rights

The Single European Act includes several provisions concerning environmental protection. These represent the germs of a constitutionalization of a Community policy towards the environment. Not only is environmental protection to be a component of the Community's other policies, but where measures concerning environmental protection are adopted with the aim of establishing the internal market they must take as a base a 'high level of protection'.

There are a number of difficulties surrounding the development of a fundamental right to environmental protection and/or integrating environmental protection as an objective constitutional 'national goal'. Most of the difficulties surrounding a simplistic rights-based approach arise out of the very nature of environmental questions. For example, if one relies on individual harm or economic loss as one's starting point, complex long term effects will show up too late. In addition, rights are not ideal tools in this situation as the conflicts and interests are often diffuse and fragmented, so that environmental decisions involve a complex web of actors: legislators, the administration, judges, the polluter, the victims, interest groups, and those that are economically dependent on the polluters. The solution may be to favour the elaboration of *participation* and *information rights* at the *Community* level.

As far as concerns constitutionalizing environmental protection at the Community level, such a move can not be assessed merely with respect to its immediate legal consequences. Not only would the proclamation of environmental protection as a constitutional Community goal encourage political integration but it would also indirectly influence: the exercise of individual subjective rights, the relationship and cooperation between the legislator, administration, and judiciary, as well as the constitutional weight to be given to strengthening procedural requirements (in particular the role of environmental impact assessment studies, and the participatory role of individuals and representative groups).

At the normative level, environmental protection should be given a stronger emphasis as a Community objective. Rights to participation, cooperation, and information could be constitutionalized so that environmental decision-making can better anticipate potentially hazardous effects.

(3) Consumer rights

Generally speaking, consumer rights embrace *two broad categories*: 1) rights to protection against economic 'risks' resulting from: unfair marketing practices, unbalanced or unfair rights and duties contained in contract terms, economic overcharging, etc.; 2) rights to protection against risks resulting from dangerous products such as unsafe consumer goods, useless or insufficiently tested medicines, contaminated food, pesticides, chemicals, etc.

Of these two categories, the latter is the one which has more direct relevance to the person in the street and in addition has acquired a more dramatic dimension. We can call all the rights comprised in this category 'rights of consumers to safety'.

It is obvious to everyone that consumers' health and safety is increasingly imperilled by the spread of unsafe products in every field and over transnational borders. Suffice it to mention that at present around 45 million people suffer from some sort of product-related accident at home, 80,000 of such accidents being fatal. Even more alarming is the fact that in the Community 25,000 children die each year due to accidents at home, mostly resulting from suffocation, poisoning or burning.

It stands to reason, first, that risks and dangers to consumers' health are caused by *private* bodies (enterprises, national or transnational firms, etc.) and that, second, restrictions, controls, regulations and sanctions can only be imposed by *public* entities, that is by Member States or the Community institutions. The problem therefore arises of seeing whether and to what extent public actors have restrained or can restrain the action of private actors for the benefit of consumers.

The European Community has not been inactive in this field. Due to the fact that at the start it was not granted competence to regulate with binding force, scrutinize or enforce the protection of consumers' safety, it has had to face from the outset the problem of how to reconcile two somewhat conflicting needs: the need to ensure free and unimpeded circulation of goods in the Common Market, without any distortion or restriction, and the need to allow Member States to prevent or restrict the importation of goods posing risks for safety and health. The balance was struck by laying down in Articles 30-34 of the Treaty of Rome, the abolition of quantitative restrictions on the importation of goods, and then establishing in Art. 36 an exception whereby Member States can ban or restrict the importation of goods, among other things, for the sake of protecting the health and the life of consumers. By and large the philosophy behind the Treaty of Rome in this area was thus to leave to *Member States* the task of providing for the health and security of consumers, while entrusting to *Community* institutions the limited task of promoting and harmonizing State policies for the protection of consumers.

Over the years, the Community has however taken a host of important initiatives. Thus, in 1976, in the hey-day of consumer protection, it adopted a 'Consumer Policy Programme', based on the idea that strong public action was needed to impose duties on private actors. A 'Second Consumer Programme', adopted in 1981, reflected the emergence of a general anti-regulatory tendency. It relied on incentives for co-operation, on the corporate responsibility of undertakings and of 'soft law' techniques replacing public intervention in the general interest of consumers. A third scheme was adopted in 1985: the 'New Impulse for Consumer Protection'. Although it took up and further developed the approach chosen in 1981, the 'New Impulse' is important, for it served as a basis for a number of initiatives and activities on behalf of the Community. The approach suggested to Member States centred around four regulatory mechanisms: 1) the establishment of a Community-wide accident surveillance system; 2) the imposition of a general duty of safety on manufacturers and dealers; 3) the development of appropriate control mechanisms for withdrawing unsafe products from the

markets; 4) the imposition of strict liability for defective products on manufacturers, dealers and importers.

A step forward was made with the Single European Act: Art. 100A, para. 3 EEC explicitly recognizes consumer protection as a Community policy. This provision suffers however from two defects: first, it constrains consumer protection within the scope of Community activities geared to the completion of the internal market; second, the legal provisions are addressed specifically to the Commission alone, and not to the Community as a whole. More significantly, the Single European Act has not changed the distribution of competence between Member States and the Community in the area of consumer protection: safety remains the responsibility of Member States so long as they do not decide to transfer the regulatory power to the Community institutions.

In spite of these limitations in primary Community law, and although a 1989 draft directive, concerning general product safety, will probably meet with strong opposition from some Member States, an important factor should not be overlooked: over the years a number of special directives have been adopted, which are graded according to the hazard potential, in such areas as medicines, pesticides, chemicals and other consumer goods. This body of secondary Community legislation means that the regulatory competence formerly held by States under Art. 36 is in the process of gradually shifting towards the Community.

Can we be content with these new policies and this new legislation of the Community? It is suggested that they are inadequate and insufficient. One of the major drawbacks of the present state of affairs regards the judicial remedies available to consumers. At present, individuals and consumer organizations can bring an action under Article 175 against Community institutions for omitting to act or even for insufficient action; this right, however, is subject to the condition that the claimants should have legal standing, that is, that they should show a direct and individual concern. No class action is provided for. In other words, only those who are directly and individually threatened or affected by a concrete danger can bring a suit. It follows

among other things that standing can exist in the field of 'process regulation' while it can be absent in the field of 'product regulation': decisions on the installation of an enterprise always concern a limited number of consumers, namely those who live near the plant. By contrast, risks resulting from unsafe products concern the whole mass of European consumers, who however lack standing until such time as they are directly and individually threatened.

To improve upon the present condition, administrative powers in the area of consumers rights ought to be delegated by Member States to the Community. In addition, it would be appropriate to grant consumers and consumer groups broader rights of remedial action.

Let us take a close look at the changes which could usefully be introduced in this area.

The following set of normative measures seem advisable.

First, the right to safety should be laid down in the Treaty of Rome itself. It is neither necessary nor appropriate to give a definition of such a right. Rather, it should be formulated in loose terms, as a general clause setting out requirements concerning the safety of installations and products, graded according to risks. In addition, it should grant a broad discretionary power to the Community to take appropriate action graded according to the risks concerned.

Second, although regulatory powers, i.e. the power to issue regulations on product safety throughout the Community, can be transferred to private standard-setting institutions, so as to integrate expert knowledge in the process designed to define the level of safety protection. There is however an area where the Community should instead retain regulatory powers: this is the area of hazardous products, where control could be effected, according to the degree of potential risk, through licensing controls, a registration procedure or follow-up market controls.

Third, where regulatory powers are transferred to private bodies, public interests should however be safeguarded by the Community institutions, which should retain the power: 1) to influence the private standard-setting procedure (this might also include the necessity of providing for procedures for prior administrative approval or prior registration for certain products); 2) to impose on the private entities the duty to open up the standard-setting procedure to public interest groups; 3) to guarantee consistent mechanisms of post-market control in order to facilitate the taking of corrective action, if need be.

Fourth, in addition to participating in the standard-setting procedure, citizens should be granted the right to participate in all product control procedures, irrespective of the particular regulatory technique employed.

Fifth, all consumers and consumer organizations should be given the right to take action before the European Court of Justice for the Commission's failure to act or for insufficient action. In other words, the legal requirement that only those who can show a direct and individual concern have a legal standing, should be abolished by amending Art.173 of the Treaty of Rome. In addition, the role of the European Parliament as a consumer watch-dog should be enhanced by granting the Parliament the right to sue the Council for inaction in the area of consumer rights (this measure too would, of course, require amendment of Art.173).

(4) Educational/cultural rights

Political and legal constraints

There is some political resistance to Community action in this sphere. In particular the United Kingdom, Denmark, and the Federal Republic of Germany have voiced their trenchant opposition to certain Community moves. This is not due to a determination to resist the advancing tides of Community expansion at all costs, but is partially linked to extraneous factors. For example the Länder in the Federal Republic of Germany are reluctant to see their special competence for education eroded, and in the cultural sector, Denmark, Germany

and the United Kingdom have special linguistic and cultural links outside the Community which would be threatened by serious moves towards 'Community Culture'. However whether the Community takes specific action or not in this field, the creation of a single market will offer numerous increased opportunities in the educational and cultural fields. In order that these opportunities be fully exploited, a number of problems should be overcome.

Selected problems

(a) Educational mobility

The Commission's proposal for a directive granting a right for Community students to enter other Member States and take up residence should be implemented. Furthermore, one can foresee the possibility of other measures designed to increase educational mobility being legally justified as necessary for ensuring the genuine free movement of workers. Clearly, real mobility for workers will be dependent on frontier-free opportunities for training and qualifying. As regards other obstacles to mobility attention should be focussed on the academic recognition of diplomas and periods of study so that Community students will eventually enjoy an enforceable right to study or train abroad.

(b) Equal treatment

Two classes of Community citizens

Due to the present legal framework there is discrimination in the field of education between: *Community workers and all the members of their family*, and *other Community nationals* in the field of education. This second category includes *Community students* who enjoy fewer rights than those in the first group. Whereas the first group are guaranteed equal treatment with nationals, Community students are guaranteed only *equal access* to the limited sphere of *vocational training* as defined by the Court of Justice. This hardly seems justified in the context of 'A People's Europe'. However, it is not difficult to see why Member States would be reluctant to open up their education

systems to every qualified Community student who wants to come: firstly, students would quickly gravitate to the most generous Member State and so overburden the limited educational resources available, and secondly foreign students might be perceived as 'free riders' who pay no contribution in taxes and take their skills away with them when their study period is over. One solution would be a scheme similar to that which already exists for allocating the financial burdens of medical care in the Community.

Equal Treatment of Non-Community Nationals

There is considerable discrimination against non-Community nationals in the sphere of education. This is so even where they are permanently resident. In other federal systems such as Canada and the United States it is unconstitutional to deny financial assistance in this field to lawfully resident aliens. Even though these countries can be distinguished, as the federal power is responsible for the admission of aliens, international human rights instruments often outlaw discrimination between nationals and aliens in the field of education. From a human rights perspective it would seem desirable to alleviate some of this discrimination.

A cultural rights policy

Some of the greatest opportunities for cultural workers may undoubtedly result from the full implementation of Community freedoms concerning free movement, freedom of establishment, and freedom to provide services. However, it is exactly this development which threatens individual cultural rights: not only will some cultural workers be subjected to new competition from abroad, but those Member States which currently offer a high level of subsidy may be less enthusiastic about financing culture when the artists and their creations are 'foreign'. This could lead to a reduction in funds available for the preservation or promotion of culture. Solutions might include the following: first, the permissible limitations to Community freedoms (such as those found in Articles 36 and 56 of the Treaty of Rome) might be interpreted so that the protection of culture would justify restrictions on Community freedoms (as a

first step a trilateral Declaration by the Community institutions is suggested). Second, Community competence could be given a firmer legal foundation. This could be done by means of a separate Treaty (which might provide for non-Community states to become parties).

(5) Rights *vis-à-vis* the public administration

It is common knowledge that the public administration of modern States has been increasingly expanding. In particular, it has broadened its activity from the traditional task of safeguarding law and order to that of providing services and various forms of assistance to citizens. In addition, intergovernmental administrations have been set up, which directly or indirectly affect the lives of individuals; in this respect the impact of supranational authorities existing in Western Europe, i.e., the Community institutions, is an extreme and glaring example of the way non-State bodies can impinge upon the daily life of individuals and enterprises.

These developments have rendered it imperative that those who are or may be affected by administrative decisions (either as their addressees or as third parties who may be affected by those decisions, e.g. competitors of an enterprise which has been granted a public subsidy) do not become the object and 'victims' of this process. To put it differently, the administrative process should be 'transparent': the individual should be enabled to look into it, and, if need be, to set forth his or her demands and be enabled to challenge administrative acts.

To meet these needs, individuals should be granted three basic rights: 1) *the right to information* about the relevant regulations and decisions (including the right of access to administrative records, the right to be informed about the reasons behind the administrative act and the remedies available against it); 2) *the right to be heard* before a decision is taken, whenever it is unfavourable to the individual or adversely affects his or her rights or interests; 3) *the right to a legal remedy*.

In Western Europe, the problem of respect for these rights arises at two different levels: *vis-à-vis* the acts of *national*

administrations, and *vis-à-vis* acts adopted by *Community institutions*.

As far as the first level is concerned, European States have all endeavoured to grant individuals the aforementioned rights. However, gaps and differences exist, in particular in the areas of access to public records and judicial and other remedies *vis-à-vis* the acts of the public authorities.

In view of these differences and the resulting uneven protection of the individual, the role of the Community could consist in attempting to promote the harmonization of some general principles. To this end, it would be advisable to work out a general text (in the form of a resolution or a recommendation by one of the Community institutions, possibly the Parliament) setting out a series of principles (e.g. concerning the codification of rules regarding the administration, the compilation of case-law, the elaboration of practical guide-books; in the case of general administrative acts or regulations, the principle of consultation by public authorities of those who might be directly concerned should be proclaimed, as well as that of publicizing the preparatory work before the adoption of the acts; other principles should deal with the end of the anonymity of civil servants performing administrative acts; the setting up of non-judicial, as well as judicial remedies against administrative acts, etc.)

If we now turn to the second level, namely that of Community institutions, it is easy to realize that by and large the three rights at issue are well respected by those institutions. Indeed, at the Community level a proper balance has been struck between the requirements of efficient administration and the interest of all those affected by Community decisions in enjoying a host of procedural rights. Community developments that have taken place in this area at the Community level reflect such a careful and well-balanced consideration of conflicting needs, that they have started gradually to trickle down into national administrative systems. Gaps and deficiencies can however be discerned in this luminous picture. Thus, for instance, as far as the *right to information* is concerned, Community decisions do not always state their reasons. As for

the *right to be heard*, lacunae can be pinpointed in three areas: first, the procedural rights of the individual are not codified; secondly, the right to inspection of files suffers from glaring exceptions; third, no specification has been made so far of which third parties are entitled to procedural rights vis-à-vis an administrative decision directly affecting other people. A few minor gaps can also be discerned in the right to a legal remedy.

Improvements of the existing situation should not be difficult. At the *normative* level, one might suggest that the right to information and the right to be heard should be entrenched in a 'Declaration of basic human rights'. In addition, details concerning the technicalities of these rights might be laid down in a 'Regulation on administrative procedures'.

B. The challenge posed by new technologies

(1) Medical ethics, genetics and related matters

(a) Questions of genetics and freedom of information

Advances in our understanding of our genetic and medical make up, coupled with advances in information technology pose a number of questions, particularly in the context of the internal market after 1992. Should personal genetic information become available to employers and insurers, those who are most vulnerable and therefore most need employment and insurance, may find themselves unfairly excluded from the market in the name of efficiency and actuarial accounting. If the Community were to introduce Community-wide rules based on the Member State which allows maximum freedom – we have to ask: whose freedom? That of the insurers or that of the job seeker, consumer, worker?

In a Community of pan-European insurance companies this is an area where supranational initiatives should lead the way. On the other hand, these scientific developments also offer enormous life saving opportunities: the knowledge that an airplane pilot will suddenly be struck with the genetically hereditary Huntington's disease (a disease which sends the

nervous and muscular system into violent spasms) could save hundreds of lives. Similarly, the availability of computerized information on citizens' blood groups, allergies, sensitivity to anaesthetics, medical records, DNA fingerprints etc. could be vital in emergency situations. In an era of free movement of workers and mass tourism these questions demand more than mere co-operation between sovereign states. Supranational co-ordination is clearly essential; however, such action should go beyond removing barriers to free trade. Who should know, and who should not know, this sort of information has to be governed *not* by market forces, but by carefully thought out policy. The use of 20th Century technology can not always be regulated by 19th Century economics. Similar problems are already emerging as AIDS sufferers and seropositives are discriminated against and marginalized.

(b) Reproduction technology and freedom of information

Moving to questions of reproduction technology we again find some of the problems posed in terms of rights to information: the parents' right to know the sex, colour, ability or disability of children before they are born. And similarly the rights of children to information about their biological origins. Due to advances made in the various projects concerned with mapping the human genome, it will be possible to increase our knowledge about genetic predisposition to certain diseases. Again it is suggested that these questions are linked to the market and more particularly to the insurance market. Some people are concerned to safeguard parents' right to decide to go ahead and have handicapped children. As more information on future generations becomes available there may be some pressure either from the welfare state or from private actors not to bring such financial burdens into the world.

(c) The commercialization of the body

Other advances relate to artificial insemination, surrogacy, embryo experimentation and organ donation. Here one can discern a tendency to prohibit by law the 'commercialization' of these sectors. Alongside these developments is a changing dynamic in society which questions the link between sexuality

and reproduction, and the norm of having a mother and a father. When the new reproductive possibilities are viewed as more than therapeutic aids but as offering to women more reproductive choice, it seems inappropriate to prohibit certain forms of family life for those who are forced to have recourse to alternative forms of reproduction when others remain free to adopt different combinations once they have 'naturally acquired' the child. Attempts to control the suitability (in non medical terms) of a prospective family where artificial reproduction is contemplated would seem to be an unjustifiable intrusion on privacy with sinister overtones of eugenics. It is particularly inappropriate that such 'judgments' should be entrusted to doctors, who are ill-equipped to take such decisions.

Questions concerning surrogacy have been decided on the grounds of privacy and equal protection in the United States. In the *Baby M* case, Judge Sorkow pointed out that men were free to offer sperm and that similarly women should not be denied the freedom to reproduce. However, this logic was not followed by the New Jersey Supreme Court which stated that one can not permit the conversion of the body into a commercial commodity.

These two visions of human dignity constantly conflict. Whilst some want to outlaw reproductive technology, genetic engineering, and embryo experimentation on the grounds that it threatens health and dignity, others demand freedom to research, freedom to decide about their own body, and freedom to contribute to the health and dignity of future generations. This tension is particularly difficult to resolve as both sides are invoking the same values.

Concern about embryo experimentation raises the question of the status of the 'embryo'. What is striking is the ease with which embryos can be manufactured and preserved, however the fact remains that embryo research could lead to a reduction in human suffering in the long run. The European Parliamentary Resolution on ethical and legal problems of genetic engineering (16 March 1989) 'considers it should be a criminal offence to keep human embryos alive artificially with a view to removing tissues or organs as the need arises'. The

Resolution suggests a number of other criminal prohibitions in the field of embryo research and cryopreservation as well as in the fields discussed briefly above: genome analysis, somatic gene therapy, and genetic manipulation of the germ line.

As far as the child itself is concerned it is important not to forget the *right not to know too much about oneself* so that one may discover one's own unique identity oneself. However, limited information about one's biological origins which preserves the anonymity of the donor should be available.

Law can not hope to keep up with technical advances in this field, and should not attempt to legislate for future hypothetical situations. Furthermore attempts to legislate in this field can only threaten pluralism in a particularly authoritarian way.

Some of the following principles already enjoy a good deal of consensus and could be evolved into a *Declaration*.

(i) Women have a special right to the protection of their health and safety in the field of artificial reproduction.

(ii) Personal genetic information should be confidential and one should enjoy a right not to be discriminated against on the grounds of one's genetic constitution.

(iii) The right to an identity, including the rights of future generations and the right to be different could be developed.

(iv) The right to know one's biological origins (with limitations so that one retains the right to develop) should be examined. (This should not be limited only to those who are the products of artificial reproduction as this would lead to undesirable discrimination and stigmatization.)

(v) The right to reproduce (with limitations relating to the rights of others and the prohibition on commercialization) could be enshrined. Safeguards should relate to the obligation to furnish sufficient information and freedom of choice.

(vi) The right to control one's own body includes not only the right not to fall ill and the right to be treated, but also the right to die with dignity.

Community action in this field could involve a combination of three techniques:

- The setting up of international commissions of evaluation and control.
- Community provisions either in the form of supranational legislation or harmonization.
- The elaboration, in cooperation with the Council of Europe, of a new European Convention on Genetics, or additional Protocols to the European Convention on Human Rights.

(2) Freedom of information

Moving away from the medical field and onto freedom of information in general, freedom of information is now considered from two aspects at the Community level. Firstly, it is considered as an essential element for ensuring democratic pluralism without which there is no real freedom of information; and secondly information itself is considered a good, and the provision of information, a service, so that the free flow of information throughout the Community is an economic activity and must be protected as such. Today the movement of information across frontiers is usually difficult to detect. Electronic media cannot be subjected to customs controls, so where this information can be legitimately restricted (in accordance with Article 10(2) ECHR), new frameworks for monitoring and control will have to be devised.

Information and the capacity to use and understand it are essential elements in the formation of a European citizenship. However, advances in this field will have to take into consideration the cultural diversity which makes up Europe. Technical progress and harmonizing measures are rightly perceived as a threat to multifarious sources of information and the preservation of pluralism. The best protection may ensue from ensuring plurality both of different medias and of actors within each media sector.

Some of the restrictions on broadcasting found in the new Council of Europe Convention on Transfrontier Television have been denounced as restrictions on economic freedom. However, the restrictions have a legitimate goal and the additional rights found in the Convention (such as the duty on broadcasters to present news fairly) could usefully complement the Community Directive on television broadcasting. It is suggested that the Community and the Member States all become parties to the Council of Europe Convention on Transfrontier Television. Such a move would both stress the Community's commitment to a common cultural identity in Europe and also avoid a possible divergence between the Community regulation of television and the Council of Europe system. Such a risk is all the more apparent while the Community legal order contains no right to expression equivalent to Article 10 ECHR.

The protection of a European audio-visual industry (and therefore European 'culture') raises very difficult questions. A vaguely worded formula which allows broadcasters to put out their Euro-quota at three o'clock in the morning will hardly serve the objective of pluralism in Europe. It is quite clear that American and Japanese production companies would quickly take over or merge with European producers if this was the only way into the European market. On the other hand a rigid quota system could sap incentive, deny consumer choice, and result in European co-productions with no 'cultural' content merely comprising of a hotch-potch of languages, locations, and story lines. In legal terms, a quota system can be justified by the constitutional principle that the authorities have to safeguard freedom of expression and access to broadcasting to a variety of broadcasters representing different social currents and opinions. In finding a solution to the protection of pluralism, particular attention should be paid to the subject of media concentrations and problems concerning exclusive access to events of public interest. Furthermore, it is suggested that some harmonisation be attempted concerning tax regimes and national systems of state subsidies. Special consideration will have to be given to the legitimacy of state aids in this area as one of their objectives is concern for the the protection of

fundamental human rights and the protection of pluralism in Europe.

Another development worth noting is the phenomenon of 'electronic or living-room democracy'. In other words the possibility of instant opinion polls/referenda which will influence governmental action. Clearly there are several advantages of representative democracy: active participation by citizens, and the constant reformulation and elaboration of the most suitable solutions for the long term, rather than popular partisan immediate satisfaction; and it is suggested that questions concerning the make-up of electronic (or other) opinion polls should be studied by the Community in cooperation with the Council of Europe.

(3) Data protection versus the right to privacy

It was stressed above that technological progress can have adverse consequences for the freedom of individuals in the area of data processing. The staggering resort to computer science for the collection of data concerning the personal life, career and other information about individuals might easily result in grave encroachments on their privacy. How then to reconcile two seemingly conflicting needs: freedom to impart and receive information, and respect for the private life of individuals?

Fortunately, Member States have become aware of such perils and have passed legislation on the matter. A comparative survey of national and international legislation shows that a set of principles have emerged designed to reconcile the aforementioned conflicting needs. These include: the principle of limited collection of data (whereby the unlawful or unfair collection of personal data is prohibited); the principle of the 'quality of data' (on the strength of which, data must be adequate, accurate and up-to-date, besides being relevant to the purposes for which they are stored); the principle whereby the goal of data collection must be specified; the principle limiting the use of data, so that dissemination of data or interconnection of files is made conditional on the consent of the persons concerned or in accordance with the existence of a specific legislative authorization; the principle banning unauthorized utilization of

data; the principle of transparence (whereby information about the existence of files, their purpose and use are to be made public); the principle of individual participation (by virtue of which the individuals concerned should have access to files, a right to rectification and to the erasing of data), and finally the principle of responsibility, establishing the personal responsibility of those in charge of files.

On close scrutiny, it appears however that there are differences between the various national laws in many areas: for instance, they differ in scope, or provide different definitions, and while some laws are general in character, those of other States only cover specific areas.

Great importance therefore accrues to the Council of Europe Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data, of 1981. This Convention exhaustively covers all the major problems arising in this area and can be safely taken as a model set of international standards in the area.

By contrast, little has been accomplished in the Community, except for a number of important resolutions of the European Parliament. It therefore seems advisable for the Community to take some form of action, in view of the specific relevance that this matter has within the Community.

As far as the merits of the prospective Community action are concerned, it would be advisable to avoid elaborating new instruments, and instead to take up the standards already worked out within the Council of Europe.

On the operational level, it might prove useful to adopt a *directive* calling upon Member States to establish a legal regime for the protection of personal data and to this end to implement the principles laid down in the Council of Europe Convention. Any Community provision should include provisions which go beyond the Convention and take account of the developments which have taken place in the last ten years. Most importantly, it is worth noting that most provisions at the national and international level were drawn up with the

mainframe computer and 'data manager' in mind. Today, data can be lost by dropping a personal computer, and information can be stolen through the telephone lines, or by pocketing a floppy disc or even by radiation detection apparatus outside the data-centre building.

(4) The promotion of freedom of information in the Community

Freedom of information has several general implications in the Community. First, a lot of information which could be of use to the individual is currently either not available or difficult to obtain. Information for Community citizens concerning the side-effects of drugs, toxicity of pesticides in use in the garden, food additives, etc is either not available or difficult to obtain. In a frontier-free single market, the Community will have to take some responsibility for ensuring that this vital information becomes more accessible.

Second, accessibility to electronic information is seriously hindered by the lack of European networks. There is no equivalent to the effective American ARPANET system, and those links which do exist demand a good deal of ingenuity, effort and money. It is essential for real freedom of information that European networks exist which allow for easy connections to host computers at a cost which is not exorbitant and does not vary widely between the Member States. This is a further example of the regulation of the internal market offering enhanced opportunities for the protection of fundamental freedoms, in this case freedom of information. Of course, such networks must be subjected to controls necessary for the protection of personal information.

C. Areas which require special measures

(1) Women

(a) Introduction:

It may appear strange that women are included as a special category in need of special protection in the Community.

However as was suggested in the introductory section on 'the gender perspective', this is due to the fact that an approach which concentrates on formal equality before the law is incapable of addressing every field where women suffer lack of opportunity and violations of their dignity.

Laws which guarantee equal rights, mean laws which offer women those rights which men already have. This is not enough. What is more important is to resolve situations where gender is the *source* of the violation. In other words, it is not enough just to outlaw and punish discrimination which makes it impossible or more difficult for women to take up certain activities already undertaken by men; what is needed is an approach which takes account of existing inequalities which result in women enjoying no equality of opportunity or equality in fact.

There are many examples of gender operating as a *source of a violation* rather than as a *condition of discrimination*: sexual harassment at work, domestic violence, sexual attacks, and mass produced images of women which commercialize and propagate their domesticity and sexuality.

However, in taking this approach we are faced with a fundamental tension: in stressing the differences rather than the equality between women and men we obviously hinder an integrated non-discriminatory resolution of the problems surrounding equal opportunity. Nevertheless it is suggested that, faced as we are, with the results of systematic discrimination and unequal treatment, the way forward is to recognize that women are faced with different obstacles and threats to their dignity. Therefore, until we reach real equality, measures such as positive action and quotas which perpetrate gender as a condition of discrimination are an unfortunate necessity.

(b) Individual rights to equal treatment and respect for dignity

The report on the 'rights of women' suggests individualized segmented rights which derive from the fundamental overarching principles of the 'right to equal treatment' and the 'right to respect for one's dignity'. These detailed rights avoid the problems which accompany the mere formulation of

general principles. The suggestions related to equal treatment cover political rights to participate, vote and stand for election at all levels of public and political activity; rights which ensure equal conditions in civil life such as the right to keep one's name after marriage and to hand it on to one's children; the right to structural support concerning pregnancy and child care; rights within the family to equal authority over their children and possessions; the right to a non-sexist education; the right to equal access to every profession; and the right to the elimination of conditions which discriminate (directly or indirectly) against women as regards eligibility for social security and other benefits.

Turning to rights derived from 'the right of women to respect for their dignity' one might include the following suggestions: rights concerning the images which commercialize women's domestic or sexual dimension; rights which ensure the protection of dignity as regards the body; rights which ensure dignity at work, in particular, to counter sexual harassment; and rights for migrant women to be treated with dignity in the host country without prejudice arising from race, social origin or economic means.

(c) Difficulties concerning methods of protection

All the problems concerning judicial protection are particularly relevant in this field. Not only are there problems of standing and limitation periods but the financial implications of a judgment may mean that its retroactive effect is tempered or even that provisions are interpreted restrictively. This is particularly evident at the supranational level as the effects of any judgment will be felt beyond the actual parties to the case. In the end financial compensation after the event will not always be the best way to ensure equality for women. Preventive measures which eliminate and discourage discriminatory practices before they take effect should be examined. Of particular interest is the work of bodies such as the Equal Opportunities Commission in the United Kingdom. Other responses to the inefficacy of judicial protection should include Community criteria for defining indirect discrimination and attributing the burden of proof, and procedural innovations such as class actions, together

with provisions for legal aid etc. so that the hurdles which prevent access to justice can be more easily tackled.

In the move towards equality in reality rather than in law it is important to deal with, and distinguish, four factors which recognize the difference between men and women. Firstly, the physiological condition of women in the context of maternity means a differentiated approach is needed both as regards the family and working conditions during and after pregnancy. Secondly, physical characteristics such as height, weight, strength may be objectively considered for some types of work. Thirdly, some types of work are classed as heavy, dirty, or dangerous; this should not facilitate justifying higher wages for men. Such classifications should be carefully examined to ensure that they are actually necessary for the work to be performed. Fourthly, legal solutions which are aimed at compensating women in the move towards equality, (such as positive action, the attribution of the burden of proof, and measures which ensure protection of dignity) are justifiable egalitarian measures which should not be 'levelled down' in the name of according men and women 'equal rights'.

Regarding the legitimacy of positive action, Article 4 of the UN Convention on the Elimination of All Forms of Discrimination against Women (1979) contains a principle of interpretation which not only legitimizes positive action but also demands such action in the move towards equality. This principle is part of the domestic legal order of those states which have ratified the Convention. (All EC Member States except Luxembourg and the Netherlands).

(d) Community competence

Article 119 is exceptional among the Community freedoms in that it guarantees men and women equal pay for equal work regardless of their nationality or the lack of a transnational dimension. However in order to tackle sexual equality in a larger sense the Community might explore two fields: family policy and migratory policy.

Family policy could be developed so that the various initiatives already undertaken by the Commission are developed in a more energetic and coherent way. The Commission has drawn attention to the differences in Member States' legislation in the following fields: adoption, custody, access, and maintenance rights following separation or divorce, legislation concerning nationality and residence. Furthermore we should add procedural variables which operate differently in the Member States: the burden of proof, the applicable sanctions, and the effect of foreign judgments. The substantive and procedural differences across the Community are particularly relevant for the protection of the fundamental rights of women. Although harmonization is not necessarily a solution, some further coordination is necessary if the action taken so far concerning the social dimension is to become truly effective. One way to do this would be for the Community to encourage Member States to ratify various international instruments in this field.

Migrant women (both Community and non-Community nationals) are particularly affected by incongruities in the legislation in these matters. Furthermore, they have special demands which should be recognized as rights: equal conditions at work; housing according to the needs of their family; education and training in the language of the host country; vocational training; health and maternity care; social and cultural links with their country of origin. At the moment, migrant women are still frequently in a precarious legal position concerning matters such as residence, access to work and education. These and other matters such as the limited facilities for child care are not covered by Article 119 and the directives on equality. In addition, migrant women from non-Community countries suffer from social and economic marginalization, often ending up on the fringes of the economy with no social protection.

(e) Possible developments

(i) An autonomous right for women to respect for their dignity should be developed. This would be specified for various

sectors: eg sexual harassment at work, health and safety, criminal law etc.

(ii) Community competence should cover a) family policy b) migration policy c) the division of family responsibility and structural support concerning child care.

(iii) The European Convention on Jurisdiction and Enforcement of Judgments could be developed so as to include matters relating to family law which are presently excluded.

(iv) Preventative measures which sensitize certain sectors to the needs and rights of women should be encouraged. Examples include inspectorates and Equal Opportunities Commissions.

(v) The reversal of the burden of proof so as to favour women bringing a claim concerning discrimination should be supported at the Community level.

(2) Children

A class of persons who are very much in need of special protection is children. So far they have been taken into account by Community institutions from a specific point of view only, namely that of Labour: action in favour of children has been taken in the field of free movement of migrant workers, of vocational training as well as in a related and consequential area, that of education.

It has however been suggested that concern with children should extend to other areas, unrelated to labour: that of access to justice, health, the right to adequate information, protection against abuse and maltreatment, and that of nationality. To rebut the possible objection that these areas are outside the Community's terms of reference, it has been contended that 'on account of the principle of non-discrimination and in view of the Commission's tasks concerning free movement of persons, one ought not to demand that a specific competence at the Community level be established, for the Community to protect the interests of children'.

Even those who may disagree with this contention should take account of the following factors. First, the increasing integration brought about by the Common Market, especially in the perspective of 1992, will bring the problems of children more into focus. Greater circulation within the Community gives rise to problems of uprooting, adjustment to foreign habits, learning foreign languages, to the establishment of mixed couples (i.e. couples consisting of persons having different nationalities), information about the social, political system of the new country, etc. In many respects children are doomed to suffer much more than their parents from these social phenomena. It would be inappropriate for the Community to remain blind to these problems, since to a great extent they are closely connected, or even consequential upon, the integration promoted by the Common Market.

The second factor is not related to greater freedom of movement of persons within the Twelve, but to current social conditions. It stands to reason that at present children are much more than before exposed to social violence, to all sorts of abuse, and are particularly prone to fall victim of drugs, alcohol and even AIDS. All this follows from increasing urbanization, from the disruption of family life and many other similar social phenomena that are there for everyone to see. Again, it would not be advisable for the Community to remain oblivious of all these social factors: the human dimension of the four freedoms proclaimed in the Treaty of Rome cannot be brushed under the carpet by simply stating that the Community can only act in the field of economic and labour relations.

A third factor that should not be underrated is the need to take account of the effect on children of a host of problems arising out of the emergence of new technology, particularly in the area of natural reproduction. It follows that new rights are now proclaimed with which the Community institutions may have to deal: the right of the child to know his or her biological origin, in particular the right to be informed about possible genetic deficiencies and their transmissibility, the right to a family, etc.

That the Community has not remained deaf to the special needs of children is proved by the fact that the Community institutions, in particular the Commission and the Parliament, have dealt with a set of problems going beyond those strictly relating to labour and vocational training. This action should however be expanded and strengthened. On the normative level, it would be appropriate for Community institutions to prompt the Member States to ratify the existing or new Conventions, in particular the U.N. Convention on the rights of children.

(3) The nationals of third States

It would preposterous to aim at creating in the Community a sort of paradise – as far as human rights are concerned – for Community nationals, while totally neglecting the condition of all those, who possessing the nationality of third States or being stateless, find themselves in the Community territory for reasons other than tourism. Human rights are by definition *universal*. One of the basic principles protecting human dignity is the principle of non discrimination, which is designed to abolish barriers and invidious distinctions between individuals. It would therefore be contrary to the very essence of the doctrine of human rights to disregard people coming from third States and residing on the territory of one of the Twelve.

Lofty principles have however to face the harsh reality of economic and social conditions. Adjustments to and attenuations of the strict demands of the human rights doctrine are therefore called for.

Let us start by saying that the problem arises not only with regard to migrant workers, but also with respect to their family dependents, as well as refugees, stateless persons and asylum seekers. For the sake of brevity we shall concentrate here on the largest class, namely migrant workers.

Here, we must distinguish between those who reside or have resided in one of the Twelve for short periods, and those who have established themselves permanently in one of those countries, and at any rate have resided there for a minimum of

five years. Both classes of people of course enjoy the basic rights and freedoms provided for in the European Convention of Human Rights and its Protocols. These instruments, however, do not regulate the entry, the length of residence or the working conditions of aliens. We are therefore obliged to fall back on the national legislation of each of the Twelve as well as Community legislation, if any.

A survey of this body of law makes it advisable to concentrate on those belonging to the second of the above mentioned-classes, for it is only with regard to them that national and supranational legislation is likely to grant rights assimilating aliens from third States to EC nationals.

What then is the present legal situation of these individuals? Four main points must be made.

First, there exist wide differences among the Twelve as far as national legislation on the treatment of aliens is concerned. Differences concern admission, the granting of a residence or work permit, the granting of specific rights relating to working activities, and expulsion. The major common feature of this legislation is that it markedly differentiates the position of non-EC migrant workers from that of the nationals of each receiving EC Member State.

Second, the labour market situation constitutes the decisive criterion used by national authorities when deciding on whether to issue a residence permit and for how long.

Third, Member States are allowed to discriminate on the basis of nationality between their own nationals and third States' nationals (or between other EC nationals and third States' nationals) in the field of entry, residence and access to work. For these discriminatory measures to be lawful, they must be authorized by national legislation. To put it differently, EC legislation does not prohibit the aforementioned discrimination, where it is laid down in national legislation.

Fourth, even those aliens from third countries who have legally resided in one of the Member States for more than five

years have no right to move freely within the Community territory.

What has been done so far at the Community level to cater for the needs of alien migrant workers?

Apart from a few resolutions of the European Parliament and a Decision of the Commission (adopted in 1985 and revised in 1988), mention should be made of the Regulation adopted by the Council in 1968 (no. 1612/68 and revised in 1976 (Reg. no. 312/76). While reaffirming that Member States are not prevented from discriminating between EC nationals and aliens coming from third States, the Regulation accords a privileged position to those family dependents of EC nationals, who have the nationality of a third State (according to Art. 11 the spouse and children have the right to accept any form of wage-earning employment on the territory of a Member State, even if they do not have the nationality of any of the EC Member States).

In addition, some agreements entered into by the Community with third States (Tunisia, Algeria, Morocco, Yugoslavia) provide that EC Member States will not discriminate against the nationals of these countries with respect to conditions of employment and remuneration. Under an agreement with Turkey the Parties agree to gradually attain the free movement of migrant workers and the prevention of any form of discrimination.

All this no doubt is very little compared to the magnitude of the problem. If however so little has been achieved hitherto, this is accounted for by the pressing demands of national workers who, faced with growing unemployment, exact greater protection for themselves especially in view of the impending dismantling of the last barriers to free movement of EC nationals.

It would, however, be naïve to believe that by simply erecting or strengthening barriers, the growing influx of foreign workers both from Third World and Eastern European countries will be stopped. To pursue such a policy can merely result in a growing number of illegal immigrants, who will be

ruthlessly exploited as cheap and unprotected labour; besides, this policy may also gradually lead to an increase in racism, crime and degrading treatment.

The better way out should consist of elaborating a policy designed to tackle the problem at its root, both abroad and within the Community territory. As for the 'External policy', it would be advisable to work out a better development policy concerning the Third World countries from where the flux of immigrants is greatest. The aim, plainly, should be to help create the economic and social conditions in third States so that there would be less desire to emigrate. By the same token, and with regard to Eastern European countries, a more active policy in the field of human rights with a view to improving the human rights record there, together with economic assistance, might prove helpful in diminishing the demand for expatriation.

So much for the 'outside' action. As for the action to be taken on the Community territory, a long-term objective should be pursued: to put those aliens from third countries, who are lawful permanent residents in one of the Twelve, on the same footing as EC nationals, by (a) granting them equal treatment with the nationals of the country of residence at least in a number of areas and (b) full freedom of movement within the territory of the Community.

Until such time as these objectives are attained, some interim measures ought to be taken as intermediate steps. In particular, one may mention the granting of voting rights in local elections, the establishment of schooling programmes and vocational training for young immigrants, as well as the setting up of an EC bureau for combating racial discrimination.

Of course, even assuming that the political will for the achievement of the above ambitious objectives can be mustered, the plight of new immigrants, or of those who cannot yet be regarded yet as permanent residents, will continue to pose huge problems for each and every Member State of the EC. So long as no common policy is devised and carried out in this area, each Member State will have to come to grips with a host of serious problems by itself.

D. Is Community citizenship a means of enhancing human rights?

There is much talk of a Community Citizenship, European citizens, 'L'Europe des citoyens' and so on. This slogan has impressed the minds of many, and even stickers with twelve stars on a blue background and the lofty catchphrase 'Europe my country' have been distributed. Is this just a way of catching the imagination of the person in the street or is there something substantial behind it? What is no less important: assuming the second alternative is true, is the concept of Community citizenship instrumental in strengthening human rights in Europe, or is it instead 'irrelevant' to human rights?

Four main points must be made. First, nationality is a bundle of rights and obligations based on a personal or territorial link established by each Member State of the Community, and on which each of the Member States of the Community is keen to retain the final say. Thus, the U.K. legislation alone says who qualifies as a British national, only France can establish who possesses French nationality, and so on.

The second and closely related point is that the Community has no authority to encroach upon this area: it cannot substitute itself for each of the Member States and decide who are its nationals. The third point is that Member States are very unlikely to relinquish their authority to decide on nationality. To put it differently, they and they alone will continue to decide who can be regarded as belonging to each of them thereby having the special legal status of national of the UK, France, Italy, and so on.

Fourthly, for the time being, Community citizenship only means that all nationals of each of the Twelve have a limited set of rights and duties in common: *freedom of movement* (that is the right to enter the territory of any other Member State), the *right to reside* in the territory of another Member State for the purpose of pursuing an economic activity there (as job-seeker for up to three months, as recipient of services only

'temporarily', which however could mean 'for an indefinite period', the right to *equality of treatment* (in the area of work and employment, including enjoyment of trade union rights as well as regards elections to governing bodies of social security institutions). In addition, Community citizens enjoy a host of *procedural rights* vis-à-vis Community institutions (e.g. rights vis-à-vis Community organs, in particular the right of appeal to the European Court of Justice under Art. 173, para. 2).

If this is so, and if in particular Community citizenship only entails the aforementioned limited cluster of rights, one may well wonder whether this concept is conducive to an enhancement of human rights of nationals of the Twelve.

The answer is definitely in the affirmative. To expand the number of rights making up the concept of Community citizenship would no doubt bolster respect for human rights. For example, to expand the area of equality would put the national of a Member State residing in another Member State in a less disadvantageous position vis-à-vis the nationals of the State of residence. To grant foreign residents voting rights in local elections would enable them to have a say in the life of the community where they live. To allow foreign residents to take part in direct elections to the European Parliament held in a Member State other than their own would facilitate their participation in the political process leading to the choice of European representatives, and in addition would enable them to make a better choice (on the assumption that they may know better the candidates of the country where they reside permanently than those of their country of origin). To give foreign residents social security benefits at least as high as those accruing to nationals of the country of residence would ensure greater equality between workers and a uniform level of welfare.

It would therefore seem that the better way of moving forward would be to enlarge the present set of rights constituting the common possession of nationals of the Twelve. The goal of this gradual expansion – to be achieved by means of Treaty amendments and, where possible, secondary legislation – would be to gradually build up *a common ground for nationals of the Twelve* not only in the area of labour and related areas but

also in other fields, where they are no less in need of greater protection: rights to safety, environmental rights, educational and cultural rights, rights to information and the protection of privacy, rights in the area of genetics, medical ethics, and so on. It is thus apparent that a marked progress in all the fields to which specific reports in our research project have been devoted would of necessity entail an expansion of the concept of Community citizenship.

A collateral means of reinforcing the protection of those nationals might also reside in facilitating the acquisition by naturalization of the nationality of the State of residence. This would result in at least putting the nationals of a Member State on the exactly the same legal footing as the nationals of the particular State where they have taken up permanent residence. In view of the host of problems that this solution would raise or entail, a carefully drafted international agreement among the Twelve would be needed for this purpose.

E. Concern for respect for human rights in the outside world

As was briefly stated above, the Community cannot, and does not, ignore what happens in the outside world. To concern oneself exclusively with what happens at home would be a selfish and outmoded attitude: human rights being universal, their respect does not stop at the border.

Although devoid of both a general mandate in the field of human rights, and of specific terms of reference concerning the impact of human rights on external relations, the Community has dealt with those rights with regard to the outside world too. Thus, the preamble and Art. 4 in the III Lomé Convention (1984) as well as the Joint Declaration relating to Art. 4, stress the importance of respect for human rights. The same holds true for the Cooperation Agreement with five Central American countries, of 1985, and the Agreement with Cyprus, of 1972 (Art. 5). In addition, the Community has shown its interest in greater respect for human rights in the outside world by signing the Helsinki Declaration (1975).

To match this normative action, the Community has repeatedly taken action at the operational level. Various Community organs have taken one or more of the following actions: 1) exhortation to third States to respect human rights; 2) condemnations of States for their violations; 3) adoption of so-called sanctions (economic measures designed to penalize the target State) against countries found in breach of human rights (South Africa, USSR, Poland, Greece, Turkey as well as Argentina). In each case the action has taken a different emphasis, depending on the organ: by and large the European Parliament has been more alert to human rights, but also prone to a merely verbal condemnatory attitude; less vociferous have been the Commission and the Council, who have preferred a cautious, diplomatic attitude, along with the organs of the EPC (where in 1987 a 'Working Group on Human Rights' was established).

While the above course of action concerned the authorities of third States, a different line of action has also been adopted for Community firms operating in South Africa – a Code of conduct was adopted in 1977 and revised in 1985.

Unfortunately, these policy lines have not yet yielded satisfactory results. The Parliament has failed to ensure that its pronouncements have the requisite impact on public opinion and the media. The Council and the Commission have shown a tendency to what might be regarded as excessive self-restraint, thus often missing an opportunity to exercise leverage on States that benefit from Community aid. As for the Code of conduct for Community enterprises, it has been given scant attention by its prospective addressees, mainly due to the fact that it lacks binding force.

To improve the present situation, a host of measures are called for. At the normative level, it would be important to insert provisions relating to human rights in as many international agreements signed by the Community as possible. If appropriately formulated, these clauses might offer the Community the right to call upon the contracting party to comply with human rights standards without its shielding behind the principle of non-interference in domestic affairs.

Furthermore, the Community ought to aim at transforming the Code of conduct mentioned above into a legally binding instrument.

V. Methods of Protection

A. Two different approaches: judicial review & access to justice

The issue of methods of protection of fundamental human rights in the EC is at least twenty years old and has ushered forth an immense literature.

The unifying theme of most of this literature and indeed the theme that has dominated the discussion of human rights in the Community has been judicial protection of fundamental human rights. This is understandable: in the absence of a written Bill of Rights in the Treaties establishing the Community, and in the face of a need to fill this gap as a means of protecting the evolving constitutional rather than international character of the Community, the Court played both a prominent and courageous role in evolving its jurisprudence.

Judicial protection in the Community functions through the ability of the individual, utilizing any of the judicial routes available to him or her, to challenge a Community measure before the Court of Justice of the Community.

Principal points of discussion about the judicial method have been:

- The normative content of protection, namely what rights will be given protection;
- the question of standards, namely the level of protection to be afforded the individual by comparison to Member State standards;

- and finally the absence of a written list of these rights.

Implicit in this discussion is the assumption that the essential problems surrounding human rights can be solved provided the normative contents of the rights and the judicial protection:

- are sufficiently wide (capturing all classical and new socio-economic rights);
- sufficiently high (protecting them at an adequate level);
- and sufficiently clear (affording the individual, and the legislator, the ability to know what rights are protected).

The 'Ideal Type' of protection may thus be characterized as a normative-judicial model: substantive rights backed up by judicial review through the classical method of seizing the Court. The Joint Declaration of 1977, the Commission Memorandum of 1979 on accession of the Community to the ECHR, and even the more recent Parliamentary Declaration of Fundamental Rights all fall within that paradigm: they identify defects in the model and suggest steps to improve it. This is the essence of what we would call, at least for convenience sake, the 'Judicial Review Approach'.

The focus by commentators, and by the Community political organs, on Judicial Protection and on the great constitutional consequences for the Community legal order of this protection have, however, to some extent impoverished the debate about methods of protection of individual rights.

This 'impoverishment' has two dimensions: in the first place much, though not all, of the literature has tended to be celebratory rather than critical in its approach, neglecting some of the more difficult and perhaps even uncomfortable points in the evolution of judicial protection.

Second, other dimensions of protection of fundamental human rights have perhaps been neglected. To critique the normative-judicial model is not to suggest its overthrow. It is certainly not to criticize the European Court of Justice which has played a crucial role in the evolution of individual protection in the Community.

The normative-judicial model must remain, and will remain, the cornerstone of protection of human rights in the Community. It is the near exclusivity of this model which must come under critical scrutiny. Even the most cursory reflection will reveal some of its weaknesses. Like similar all embracing models used in the economic analysis of law, it assumes a world which is transparent and rational, which often does not correspond to reality.

We shall first illustrate some weaknesses by way of example, then attempt a systematization of problems, and finally suggest a complementary model which should become, in our view, the focus of the procedural part of the Human Rights Action Plan.

Here, then, are some examples to highlight shortcomings of the normative-judicial model.

There may be a perfect substantive right (in terms of content) which protects the interests of an internal or external migrant worker; it may be judicially interpreted and enforced at a high and progressive level once adjudicated by the Court and it may even be set out clearly in some written document, and yet it is quite possible, and even probable, that the principal subjects of such a right, the migrant workers themselves – for reasons of cultural, linguistic and socio-economic barriers – will be totally ignorant of their ability to rely on such a right or rights when faced with a violation. They will simply never reach the Court.

There may be a perfect substantive right (in terms of content) in the area of consumer or environmental protection, but the impact of its violation on any single individual could be so fragmented or diffuse, that either for formal legal reasons of

standing or because of the cost of litigation, it will never reach the Court.

There may be a perfect substantive right (in terms of content) protecting the privacy interest of an individual against data collection or storage and giving him or her both access and a remedy in case of a breach. There may even be adequate judicial remedies in case of a violation. But the individual might not even know that his or her personal data have been entered into the data base.

There may be a perfectly construed right in the field of education or social security which, however, requires a financial outlay by public authorities if it is to receive full, or even partial, vindication. Comparative analysis alerts us to the danger of expecting/requiring courts to vindicate such rights which have an impact on the public purse. In some jurisdictions, courts simply refuse to do so. In others, they do with complex political and socio-economic consequences.

These four simple examples drive home the point that, in itself, the normative-judicial model, however sophisticated, does not provide sufficient guarantees for the protection of human rights to be truly effective.

The normative-judicial model must be complemented by an approach which insists on effective vindication over and above the normative content and judicial enforcement.

Again, for the sake of convenience only, we would like to refer to the complementary approach as the 'Access-to-Justice' approach – denoting the range of procedural devices developed to make rights truly effective.

(1) Systematization of the Access-to-Justice approach

In the following we would like to set out the methodological criteria which should guide us in the consideration and incorporation of this complementary model to our discussion. We would emphasize the following considerations:

Differentiation, Information, Institutionalization, Means and Impact, Proceduralization.

(2) Differentiation

Clearly the key weakness of the normative-judicial model is that it treats, for most purposes, all rights in the same way in terms of their method of vindication – as if all are susceptible of being vindicated in basically the same method and by the same route. The examples already demonstrate the danger of this approach. Clearly in the field, say, of data protection, an administrative provision such as a Commissioner for Data Protection and a requirement that public authorities report on any plan to open a new data base which would include personal information on individuals (such as we find in, for example, the British and the German systems) would be as important and maybe even more than a simple judicial remedy for a violation of privacy. Clearly in fields such as consumer protection or environmental protection, where interests and rights are diffuse and fragmented, consideration of different rules of standing maybe called for if substantive rights are not to remain on paper alone.

(3) Information

There are two dimensions to this parameter. The first concerns a simple information gap: we often simply do not know to what extent there is a problem of actual or potential violation of human rights in different sectors and the shape that these violations take. It is only with this knowledge that one could consider not only the normative content of the desired right but also the most effective means of vindication.

In the second place, each right, depending on its addressees – whether private individuals or public authorities – calls for a different approach to disseminating the content of the right and the means for its vindication. Sometimes legislation is enough. Other times one would have to make a concerted effort to cross cultural, socio-economic and other barriers in order to inform potential victims of their rights. In practically all Member States, large sums of social benefits remain each year

uncollected by persons with entitlements – i.e. persons whom society has deemed it right should enjoy these entitlements. The usual reason is simply ignorance.

(4) Impact and means

This heading touches primarily the so-called new social and economic rights. If the concept of human rights is not to be denigrated, it is necessary when discussing rights such as the 'right to work', or rights to 'decent housing' to consider the financial resources necessary for their vindication, and the impact that consecration of such a right may have on the state.

The converse of this elaboration – and another lesson that one learns from comparative analysis – could be the requirement in fields such as environmental protection that new legislation and new public policies in diverse areas should be accompanied by impact studies on, say, the ecological balance of the environment. In the long run such a requirement, by rendering the policy formation more transparent, may be as beneficial as an individual right which is to be protected by the judges.

(5) Proceduralization

Under this heading one would have to investigate the different legal procedural devices which should accompany each right or cluster of rights. Should the right be available only against violations by public authorities (vertical vindication) or also against private bodies (horizontal vindication)? What time limitations, if any, should be imposed? What rules of standing should apply? What kind of legal aid should be available and from whom etc.

(6) Institutionalization

In the same vein, it is clear that different rights, or different clusters of rights, may require different institutional arrangements for their vindication. Here one may consider such centralized institutions as a Community Commissioner on Human Rights whose task it would be to monitor and generally

supervise the status, content, and vindication of human rights in the Community. But it is more likely that decentralized institutional arrangements such as advice bureaux may eventually be more effective.

B. Some possible options

(1) Options under the Judicial Review approach

We would first like to deal with options regarding the classical method of protection through 'Judicial review'. The most persistent issue concerns the need for, and method of, having a catalogue of human rights as part of the corpus of Community law.

Two principal options, not necessarily mutually exclusive, present themselves here: a Community catalogue, and accession of the Community to the Council of Europe's European Convention on Human Rights machinery. We shall deal with each separately.

(a) A catalogue of human rights for the Community.

(i) Does the Community need a catalogue?

The advantages of having a catalogue have been well rehearsed and do not require extensive recapitulation here. The principal advantages would arguably be: firstly, the enhanced legal certainty that such a catalogue would create both for the Community legislator and for individuals, and secondly, the symbolic value of having a Community 'Bill of Rights'. These are not negligible advantages and should be considered carefully.

But this option is not without its difficulties. In the first place, the absence of a catalogue has not materially damaged protection of human rights in the Community. Very significant in this respect is the fact that whereas the German Constitutional Court in the 1970s seemed to insist that such a catalogue would be essential for a full accommodation of the Community legal order within its German counterpart, in the 1980s it was willing

to accept an almost full accommodation without such a catalogue. The German Court was obviously impressed by the level of protection afforded by the Community even without such a catalogue.

A catalogue may add to legal certainty, but it would also contribute to at least some form of rigidity, in the sense that it may allow less progressive development by the Court. There is an alluring advantage in the present situation which allows the Court to follow developments in all Member States and on the international level without being tied down to a specific list of human rights.

We do not wish to pronounce categorically in favour or against the option of a Community Catalogue.

(ii) What kind of catalogue?

For the first time the Community now has the chance to produce such a catalogue in the form of the Parliamentary Declaration. We have already analyzed the main features of the Declaration. In particular, we noted its codifying philosophy and its prudent approach. In this respect, it may not be ideal since, in terms of its content, it looks backwards rather than forward. It is unlikely to please all actors. The main advantage of the Parliamentary Declaration is its very existence. Since it was drafted in a search for a common denominator, and was approved by a majority comprising all groups and nationalities it may be useful, if a decision is taken to elaborate a catalogue, to take the Declaration at least as a starting point.

This clearly would have one large advantage of avoiding the hugely complex and time consuming process of drafting. One could also recall, that the Declaration has an in-built device allowing the Court to continue looking to other sources in its judicial protection of human rights.

It is clear that one could draft, and perhaps even reach agreement on, a more 'modern' catalogue. But, undoubtedly, this process would be politically very delicate and might even

result in failure which would be the worst possible result for those wishing to achieve something of symbolic importance.

(iii) The formal method of adopting a catalogue for the Community.

This might be the most delicate problem of all. We can envisage *four* main methods.

The first would be the adoption of a catalogue by way of *Treaty Amendment*. The main advantage would be the formal high normative status that such a catalogue would have in the hierarchy of norms of Community law. This would be the equivalent of a constitutional Bill of Rights *par-excellence*.

But there are dangers in this approach. First, such a method would be the most difficult in political terms and the corresponding risk of failure the greatest. Additionally, the risk of entrenching rigid rights with no room for development would present itself in the starkest terms. We would recommend caution before embarking on such a course of action course of action.

A second option would be the adoption of a catalogue by way of a *regulation* under Article 235. The advantages would also be in the formal legal status of such a catalogue as a source of law. The political process would not involve ratification by national parliaments and so would be easier. But even if construed as a framework regulation it would not become an entrenched source. A determined legislator could override it, and, paradoxically, in that case it would be more difficult for the Court to annul a measure which even though it violated human rights, nevertheless expressly derogated from the Community Catalogue of Rights contained in the regulation. If human rights were to be explicitly given the status of normal legislation, it would in effect demote their current 'higher law' character. We do not think that the advantages of this method outweigh the disadvantages.

Our preference – if a catalogue is in fact deemed desirable – is for a solution which would preserve and build on the higher

law status which the Court of Justice has given to human rights, but which would still have the advantages of a written list.

Two other options arise in this context.

The first would be to elaborate a catalogue, or make use of the Parliamentary Declaration, modified or intact, and take the 1977 Joint Declaration one step further, namely a *Common Declaration* which would associate the Community institutions with the elaborated catalogue. The catalogue in this formula would not formally attain the status of the Treaty of Rome but would become the first and principal source for the Court in its judicial protection.

The *second* option, already suggested once before, would be to make a Treaty amendment committing the Community legal order to the protection of fundamental human rights, but leaving the *elaboration in the form of a solemn Declaration*. The language of such an amendment could be similar to that used in the Parliamentary Declaration which is based on the principles enunciated by the European Court of Justice.

Thus the new Treaty Article could read:

'Measures incompatible with fundamental rights are inadmissible in the field of application of Community Law'.

This type of amendment would be less delicate from the political point of view since Member States would be codifying the Community constitutional situation as it already exists.

(b) Accession to the European Convention on Human Rights.

Before canvassing the advantages and disadvantages of accession we have to ask: advantages for who?

Reading the Commission's 1979 memorandum on this question, we are left in no doubt that accession would have at least four advantages for the Community: first, it would project an image of a democratic caring Community; second, it would enhance the Community's international personality: this could

serve as precedent for accession to various international organizations; third, it would go some way to ensuring that human rights in the context of Community law are interpreted and enforced in a consistent way; and fourth, in the event of a challenge to Community legislation, it would allow the Community to defend itself and its objectives before the Strasbourg Commission.

However, from the perspective of a potential victim, a Community citizen, looking for Community protection in the 1990's, these factors are of little interest. Accession to the European Convention would not solve some of the issues outlined above. Issues such as: to what extent can non-nationals be protected by Community law? how can cultural pluralism be protected in the era of transnational satellite television? and how can the social rights of Community workers be protected through a Community-wide implementation of the social dialogue? Furthermore, areas where the Community stands to make most progress: environmental and consumer policy, social rights and political rights in a People's Europe, and the promotion of human rights in third countries, would be little enhanced. In fact one has to admit that moves towards accession may sap energy and enthusiasm for the whole question of the protection of human rights in the Community legal order.

At present there is nothing to stop anyone complaining to the Strasbourg Commission of Human Rights about the national implementation of a Community provision. The only extra remedy which accession would bring for Community citizens would be the chance to complain in Strasbourg about the acts and legislation of Community organs. Such complaints can usually be brought before the European Court of Justice although it has not yet really developed its appreciation of the Convention.

The actual legal status of the Convention in this context is not clear, and much has been written about the legal basis for the application of the Convention by the Court. Indeed, the Commission and some of the Court's Advocates General regard the substantive provisions of the Convention as binding on the Community organs; the 1977 Joint Declaration of the three

political institutions did not go so far. For some, the theory of substitution (which explains Community competences in the context of the GATT) provides a legal basis. It is difficult to accept this reasoning given the very late ratification of the Convention by France, and the Member States' different reservations and adhesions to the Protocols. Another basis could be the duty enshrined in Article 234 of the Treaty of Rome which states that prior international rights of Member States should remain unaffected.

The issue today is largely moot. The Court has indicated its intention to look to the Convention whenever it addresses an issue of human rights. And although the Court dropped the word 'guidelines' when referring to the Convention in the *Panasonic* case (Cases 136 & 137/79 [1980] ECR 2033) and assimilated the Convention to the Constitutional traditions of the Member States, not much turns on this semanticism. In searching for criteria it was only natural that the Court would turn to the one text on which all Member States were agreed.

Nevertheless accession to the ECHR has a number of major advantages. As the Commission points out in the memorandum, 'however satisfactory and worthy of approval the method developed by the Court may be, it cannot rectify at least one of the shortcomings affecting the legal order of the Communities through the lack of a written catalogue of fundamental rights: the impossibility of knowing in advance which are the liberties which may not be infringed by the Community under any circumstances. The European Citizen has a legitimate interest in having his rights *vis-à-vis* the Community laid down in advance. He must be able to assess the prospects of any possible legal dispute from the outset and therefore have at his disposal clearly defined criteria.' (para. 5). Accession would give citizens, not only a clearly defined list, but the benefit of a large amount of case law as developed by the Strasbourg organs.

In addition, the invisible effects of accession should not be underestimated. Accession could mean that national judges would have to consider the Convention (and its case law) when deciding matters covered by Community law. Although the

Commission states that: 'Additional obligations would arise only with regard to the freedom of action of the Community institutions and their legislative and administrative functions' (para. 41), it is quite likely that accession would mean the Convention exerting a creeping influence on Community law generally.

If, under the present situation, the Strasbourg organs find the Member States liable under the ECHR for the implementation of a binding Community norm, this would be unsatisfactory in that the real defendant, the Community, would not have been the respondent. Likewise, though of lesser importance is the fact that a Member State might in theory have to defend itself before the Commission or Court of Human Rights for actions incumbent upon it by virtue of Community membership.

For some commentators, the main advantage of accession is that it would fill these procedural gaps in the protection offered by the Strasbourg system. We do not subscribe to this view. We do not think that the mere chance of a case against the Community not being properly heard justifies accession, nor do we believe that this was the real reason behind the Commission's proposal in the 1979 Memorandum.

In our view, the most important factor behind the Commission initiative in 1979 was the international personality and status implications that would have accrued to the Community as a result of accession. Accession would have enhanced the 'State' like features of the Community in a period in which European integration seemed to be stagnating. If we are right in this speculation, this rationale for accession is no longer applicable. The Community, now on an upsurge, does not need that kind of boost.

Nowadays, it is less a question of how much the Community needs the ECHR, and more a question of whether the ECHR needs the Community. There is a danger that the focal point of human rights jurisprudence might shift from Strasbourg to Luxembourg.

Our conclusion, therefore, is that from a practical point of view, accession promises to be technically and politically difficult and would result in few tangible results at the level of protection of individual rights in the Community.

But there are other reasons which lend support to the Commission proposal. The main advantage which would accrue to the Community would be the symbolism inherent in subjecting the Community, its agents and bodies, and even the European Court itself, to a measure of scrutiny by an outside body.

To those who object that the European Court of Human Rights is not equipped to review decisions of the European Court of Justice or understand the Community context, we would point out that the Court of Human Rights does after all review the constitutional decisions of national constitutional courts which are submerged in their own national context in the same way that the European Court understands the Community context.

One of the basic ideas of transnational adjudication of human rights is that it is exercised by a tribunal which is at least one stage removed from the system which it is judging. In theory, review of decisions of the European Court of Justice by a higher tribunal is feasible. In practice, it is doubtful if the European Court of Human Rights would find much to criticize in the approach of the European Court of Justice, but the possibility of such an appeal would be of enormous symbolic importance.

(2) Options under the access to justice approach

In this last section, we will present some of the options suggested for enhancing the protection of human rights in the sense described above. As with our earlier proposals, what follows is not a blueprint but is instead an inventory of the types of issues – related to methods of protection – which may be useful in considering the adoption of a Community policy or action plan.

(a) *Institutional Proposals*

It is not for us to propose specific institutions since it is beyond our ability to assess questions such as personnel, cost and the like.

Instead, we propose some approaches to thinking about institutional questions in the context of protection of human rights. We put forward what at first might seem a contradictory agenda: the need, on the one hand, for a centralized approach and, on the other hand, the need for a differentiated sectorial institutional approach. As will become clear, we believe that the contradiction is only apparent.

(i) Central coordination for Community human rights and a programmatic white paper.

It is appropriate that ultimate responsibility for Human Rights in the Community will be part of the 'portfolio' of the President of the Commission (as is the case today) who, of course, is answerable to the European Parliament. But one may consider, if an Action Plan is adopted, whether there is no place for appointment (at least for the duration of an Action Plan) of a unit or Task Force, largely autonomous, and which is headed by a high ranking official who is directly attached to the President. This office would be charged with both elaborating and then executing a Commission policy and/or action plan in this field. The exact remit of such an office would of course depend on the ambitiousness of any plan adopted. To suggest the creation of a new institutional structure might seem to fall into the old trap of substituting procedure for substance. And, after all, the realization of an *approfondissement* of human rights in concrete terms will fall on the shoulders of the various Directorate Generals dealing with the different substantive issues (environment, consumer protection, women's rights, etc.) as well as on the Secretariat and Legal Service who deal with the different procedures.

(ii) What would be the real role of a Human Rights Task Force?

The inspiration for this model comes from the Community itself: the hugely successful 1992 White Paper on the Internal Market. The primary initial charge of the Human Rights Task Force would be the elaboration of a programmatic White Paper setting out concrete goals – institutional and normative – in the field of human rights. We would hope that the present Report could help to set the agenda for such an activity. As in the case of the White Paper on the completion of the Internal Market, realization would demand an effort (far less taxing, we believe) from all services, but the existence of a coherent concept, a coherent programmatic plan, and a tangible time-table would be a key to success, and would remedy the deficiencies of the current fragmented efforts alluded to above.

(iii) Sectoral institutions

In the following, we are borrowing, selectively, from national experience in this field. Since the late 1950s, we have witnessed the enactment of a variety of human right provisions in different national contexts. One feature of these moves was the realization that it was not sufficient, in a large, diverse and complex society to put on the statute book an ever increasing number of rights and legal remedies, but that it was imperative to ensure an institutional back up which is charged with ensuring real effectiveness for the rights guaranteed. For example, in Great Britain, rights in the field of sex discrimination were backed up by the creation of the Equal Opportunity Commission. Labour law rights were backed up with a variety of arbitration and conciliation services together with health and safety inspectorates. More specific examples are given in the Report on 'Methods of Protection.'

It is possible to divide the institutional functions into the following tasks for ensuring:

A constant flow of accurate information about the realization of the normative programmes (information function).

A continuous effort of self-reflective re-evaluation of the impact of programmes as regards both their content and execution

with a view to amendment and improvement (active feedback and self correction function).

A specific active agency which would seek the legal enforcement of human rights policies, rather than simply leaving the system to rely on the initiative of victims of violations. This was the result of the realization that often the victims of human right violations were the least capable of vindicating their rights through the traditional legal system.

It is of course true that in some areas in the Community, such as sex discrimination, different Commission services covering similar tasks exist; the question is whether combating sex discrimination should be generally institutionalized and whether formalization of this function would not enhance the seriousness, prestige and ultimately the effectiveness of the exercise.

In particular, we would like to make one principled observation.

The Commission and its legal service have played a capital role in ensuring compliance by Member States with Community law – through, for example, the Article 169 procedure. There have, over the years, been hundreds of initiations of Article 169 procedures. Many were resolved at the stage of the initial seizing, some at the stage of the reasoned opinion, and in a great deal of cases the matter was brought before the Court which has vindicated the position of the Commission in the overwhelming majority of cases.

By comparison, the Commission has initiated remarkably few actions against other Community institutions under Article 173 and remarkably few actions have been initiated against the Commission and Council by individuals under Article 173. To be sure, this is partly because of the restricted standing afforded to individuals; and it is also true that there has been an increase in the number of 177b actions by individuals implicating Community measures. But as we shall explain below, the increase in the number of 177b actions can only be considered as the tip of an iceberg – an iceberg which is destined to remain submerged.

The main problem, in our view, is that, as presently constituted, the Commission suffers from a serious conflict of interests. The very same Commission and legal service charged with the guardianship of the Treaty also has a major role in the legislative process and is the Community executive and administrative branch. Thus, whereas the services and the Commission can act, and do often act, with vigour when it comes to challenging the Member States, it is understandable that the same vigour cannot, and is not, applied when it comes to self-scrutiny and self-criticism. How could it be otherwise? It is the ancient dilemma of 'who will watch the watchmen?'

The fact that the Court, for reasons which cannot be analyzed here, has denied Parliament standing to sue other Community institutions under Article 173 merely aggravates this problem.

Two policy issues thus present themselves in this context.

The first is whether the Community should create a structure which would have greater independence from the 'in house' Commission service. If the reply is positive, the second question concerns the relationship such a unit would have to the overall structure of the Commission.

It is clear that such a new structure could remain within the Commission organigram answerable to the President. But at the same time, by an act of 'self-limitation' it should be guaranteed a high degree of independence so that its activities, investigations, negotiations and litigational decisions are not subjected to the conflict of interest described above. It is premature to speculate as to exactly what form such a unit would have.

Just as we argued for consideration of the creation of central coordination in the form of a Human Rights Task Force, we would also suggest that more thought be given to specialized human rights institutional responsibilities within the Commission structures. There is no contradiction between the two proposals. They would have as their function the

monitoring and promotion of human rights in the context of a specific service which is 'human rights-sensitive.'

Our model here is a Community model. In the fields of anti-dumping, competition and the like the Community already has special monitoring and investigation services which, of course, coordinate their activities with other relevant services. Our argument is that especially where the Community has moved beyond the classical overarching rights of non-discrimination into a variety of 'positive' areas in sectors such as the labour market, the environment and the like, such institutional responsibility could be useful.

We do not think that the Commission is extraneous to these considerations in some fields, nor that it is insensitive to enforcement. But the feeling is that these efforts are somewhat *ad hoc*, differ radically from one service to another, and also suffer from problems of conflict of interest.

As part of an Action Plan, one could envisage that each Commission Service – whose activities touch on human rights – would have to engage in an exercise of self-reflection and propose internal reorganization – where necessary and appropriate – which responded to the need for active supervision and enforcement of Human Rights.

Specific Proposals in different sectors may be found in each of the substantive Reports.

(iv) Commission or Community Ombudsman. (See Reports on administrative law)

The institution of the Ombudsman is well known, has been tried in a variety of systems in different areas and hardly needs description. Views differ as to its success. The Classical function of an Ombudsman will be covered by the variety of institutional proposals mentioned above.

It is, nonetheless, worthwhile in our view to consider the office of the Ombudsman for one primary reason: the symbolic value. The Ombudsman is by now an institution known in most

societies. It is a reassuring institution and one which would have public appeal. It would be an ideal address for any citizen or resident who would not, and could not, find his or her way in the ever increasing institutional complexity of the Community. Under a minimalist approach, the Ombudsman would probably act in most cases as a sorting office for complaints – directing them to the relevant existing and new institutions. But even under this minimalist approach he or she would serve two hugely important functions: providing a readily accessible address, and making sure that complaints received treatment, were followed up, and that the complainer received an adequate and full answer.

We essentially take a skeptical view as to the creation of an Ombudsman especially since this function has been assumed by the Committee of Petitions of the European Parliament. If there is room for improvement, and we think there is, it lies in finding ways to give much higher visibility to the Committee of Petitions so that it becomes a widely known institution in Europe. This is clearly not the case today.

(v) Conclusions concerning institutional options.

All these proposals are no more than stimulants for further discussion of how to improve Community mechanisms. They do have, however, one unifying feature. They involve the Community in taking an *active* and *reflexive* rather than reactive approach to human rights.

Active in the sense of somewhat aggressively seeking to give effect to norms. *Reflexive* in the sense of understanding that these norms must be applied vigorously also to the very institutions which enact them.

(b) *Procedural proposals*

In discussing the institutional proposals we put the emphasis on an active role for the Community, and principally the Commission, in itself enforcing Community human rights. We will turn now to the other dimension of rights vindication – *by individuals themselves*. Essentially the system works by way of

actions by individuals either directly before the Court of Justice, or through the indirect Article 177 procedure. It is the latter which is the cornerstone of judicial protection in the Community and the lion's share of our proposals will address problems with that procedure together with proposals for making it more effective in guaranteeing the protection of human rights. It should be mentioned in this context that it is not always possible to differentiate between improvements in judicial protection generally, and human rights in particular.

(i) The field of application of Community law – the extent of human rights protection.

We will deal with this issue briefly. It is dealt with extensively in the Report on 'Methods of Protection'. For the reasons given in that Report we endorse the view taken by the Legal Service of the Commission that when Member States act in derogation from a Community norm, such activity should be reviewed by the Court for violation of human rights.

(ii) Reverse discrimination

The doctrine of reverse discrimination whereby no protection is afforded an individual in a purely national context is sound in many circumstances. However, to the extent that the Community right claimed by the individual, even in a purely national context, is also a fundamental right recognized by the Court, it is submitted that reverse discrimination becomes problematic in that it creates an unacceptable discrimination between Community nationals depending on the national context in which the violation takes place. It is suggested, therefore, that the Court may wish to review the doctrine with a view to limiting it in this context.

(iii) Direct effect of directives

At present, the direct effect of directives does not extend to horizontal situations where individuals seek to vindicate a right provided by a directive against another private body (in cases of non-incorporation or erroneous incorporation by national legislation). In principle, this is a sound doctrine directly

derivative from the rationale for direct effect of directives developed in the case-law of the Court.

However, in some cases, such as the Sex Discrimination directives, the Community measures encapsulate fundamental human rights. The result is the uncomfortable situation where, for example, two school teachers subjected to the same kind of sex discrimination, but one working in a state school and another working in a private school will have different remedies. There is, it is submitted, a strong case for reviewing whether in cases of fundamental human rights the direct effect of directives should extend to both vertical and horizontal situations, such effect could be explicitly stated in order to avoid any uncertainty.

(iv) The class action

Many of the new rights – such as consumer and environmental rights constitute what are called diffuse or fragmented rights; violation of these right may affect many individuals in a minor way so that individual litigation can not be justified, or national rules of *locus standi* (under which individuals seeking to invoke Article 177(b) must operate) may deny standing. Nonetheless, the cumulative violation of the right might have quite serious consequences. In theory, this type of violation could be taken up by the Commission itself, but as we saw when the Community itself is the object of attack, it is artificial to rely on the Commission to act impartially as guarantor of the right.

The class action is one of the remedies developed in other systems to vindicate diffuse and fragmented interests. The Court has already recognized the interest in intervention in actions instigated by individuals by representatives of diffuse and fragmented interests such as Consumer groups and the like. The modalities of such new standing would need special study which goes beyond the scope of this Report. To be a general remedy, it would probably need Treaty amendment, unless the Court were willing to engage in some redefinition of direct and individual interest under Article 173.

But it is also conceivable that as part of new legislative acts in fields characterized by diffuse and fragmented interests, the measure itself will specify special remedies or forms of action tailored to the field in question.

We should point out that even such measures would not wholly solve the problem. National courts remain the principal locus for vindication of Community rights and it is national rules of procedure that govern the standing of individuals and groups who want to bring an action even in the field of Community law. The only requirements of Community law are that the new procedures should not be more onerous for Community rights nor that they eliminate an action altogether.

It could only be through a difficult, though desirable, process of harmonization that one could deal with the problem raised by the disparity of standing in the different Member States.

(v) Judicial delays: 'jumping the queue'

At present the normal waiting time for an Article 177 action before the Court is well over one year and may be as long as two years. This is worrisome as regards all cases and it does not seem likely that the creation of the First Instance Court will do much to relieve the waiting. One may consider whether cases which *prima-facie* involve immediate deprivations of individual fundamental rights should be given priority in the determination of the timetable of the Court.

(vi) Non-references to the European Court

This is one of the enigmas and unexplored areas of Community law: the extent to which courts in the Member States should and yet do not make references to the ECJ under the Article 177 procedure. The implications can also touch on fundamental human rights. In any radical revision of procedures, this problem might finally have to be addressed. It seems to us that *where a Community measure is involved*, the creation of some mechanism of '*appeal*' to the ECJ against a non-reference will

have less grave implications for cooperation between ECJ and national courts than where the dispute is over national measures.

(vii) 'Grants in Aid' for test cases

It is a known feature of the Community that different types of cases come from different Member States. Thus, for example, most sex discrimination cases have come from Britain. Part of the reason is that in Britain the Equal Opportunities Commission offers financial and professional assistance in many test cases. In general, the situation in Member States as regards legal aid and other support for these types of action is quite uneven. And yet one is dealing with rights granted by the Community.

The proposal is that the Commission examine on a 'field by field' basis the possibility of giving Community funding and Community based support to meritorious actions. This will serve the double purpose of rendering the vindication of rights more effective, and also more equal, in the different Member States.

(viii) Information

The last proposal is also the most abstract and yet, probably, the most important. In our view, the key to the effective vindication of rights is information at all levels. At the level of the administrators who draft and execute policies and at the level of Community citizens. There is no one proposal that may operate here. Each sector deserves its own unique information effort. There will be one effective effort for rights directed at migrant workers and another for those directed at economic operators in the field of data protection.

In this regard, our proposal is both normative and procedural. One will recall that at a certain point in the evolution of the Community, in the interests of effective vindication of Community law, provisions were included in all directives which required Member States to report back on the incorporation of the directive – *a mandatory feed-back loop*.

It is suggested that in relation to all legislation coming out of the services of the Commission there will be a standard requirement that the legislation include provisions, or explanations, on how, (in relation to the specificity of the measure) information about the rights included therein be ensured. Clearly, publication in the Official Journal will usually not be adequate. Likewise, each piece of legislation should, as a matter of standard practice, include provisions whereby the service which proposed the measure will explain, or provide through legislation, the institutional arrangements for implementing the monitoring, enforcement, and impact of the provisions. Naturally, this will have financial implications. But then justice has never been cheap.

Following the functional division of tasks in the Community we have addressed most of these procedural proposals for reflection by the Commission and its services. This is not intended to exclude or diminish the many activities of the European Parliament in this field. The essence of all proposals was the deepening of existing institutional and procedural structures to render vindication of rights more effective.

There is one specific role that Parliament can play in this field. Parliament could, in the context of the scrutiny of Community legislation, institutionalize a specific request concerning monitoring, information, implementation and enforcement. At present, the Legal Affairs Committee scrutinizes the general Commission Report on Implementation of Community law and makes many proposals for rendering Community law more effective. But this is a centralized effort. What we are suggesting here is the adoption of a practice that any relevant Commission proposal which does not include adequate provisions or explanations for effective *dissemination*, and adequate institutional arrangements for *effective implementation* and *enforcement* in the field of human rights be automatically amended or rejected by Parliament.

We favour a decentralized approach within the European Parliament because, as explained above, in relation to each sector different arrangements would have to be made,

something that only the relevant Committees of the European Parliament would be in a position to evaluate and amend.

VI. Final Remarks

The debate about human rights and the Community has up till now focussed on whether the Community can, or should, move into this sphere, or whether this is a question which merely concerns Member States.

Member State action outside the scope of Community law which seriously threatens human rights can usually be checked by the existing national and international apparatus. However, where action is really needed is in the field of Community law. In this area, the drive towards '1992' and the implications which go beyond '1992' mean that people in the Community will be subjected to new controls, new technology, new transnational actors, new forms of work, and continuing racial and sexual discrimination. Without new rights and remedies, some individuals and groups could find the negative effects of integration outweighing the positive opportunities which it claims to offer.

If Community institutions and legislation do not take full account of the human rights implications of the Community dynamic they will quickly alienate the men and women who make up Europe. However, there is no one simple step which would resolve all the human rights problems in the field of Community law. Human rights protection is a question of constant vigilance. It is for the Community to respond now to the anxiety and fears expressed by its citizens. The drawing up of a Human Rights Action Plan (together with organizational measures for the realization of such a plan) should be the first step.

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